(1)

91-1202

No. _____

Supreme Court, U.S.
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IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM 1991

Ann Richards, Governor of Texas; Selden Hale, III, Mamie Moore Proctor, Hon. Clarence N. Stevenson, Allan B. Polunsky, James M. Eller, F. L. Stephens, Jerry H. Hodge, Joshua W. Allen, Sr., Ellen J. Halbert, Members, Texas Board of Criminal Justice; James A. Lynaugh, Executive Director, Texas Department of Criminal Justice,

Petitioners

v.

John Lindsay, Harris County Judge; El Franco Lee, Jim Fonteno, Steve Radack, Jerry Eversole, Harris County Commissioners; Johnny Klevenhagen, Harris County Sheriff,

Respondents

v.

Lawrence R. Alberti, Jimmy E. Collins, Henry C. Langer, Jose' J. Pina, II, Pat Reed, Wesley Sellers, individually and on behalf of all others similarly situated,

Respondents

On Petition for Certiorari
To the United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under principles of federalism and Article III of the Constitution, federal courts have jurisdiction to decide unsettled questions of state law involving a dispute between two levels of state government concerning state fiscal policy and a complex regulatory scheme when resolution of the dispute was not necessary to provide relief to the Plaintiff prisoner class in a local jail?

2. Whether a federal court's order, based solely on state law, that the state must compensate one of its political subdivisions is in violation of the Eleventh Amendment when such order is not necessary to provide relief to the prisoner class in a local jail?

3. Whether, under principles of federalism, federal courts should abstain from deciding, or, alternatively, certify to the Texas Supreme Court, unsettled questions of state law involving a dispute between two levels of state government concerning state fiscal policy and a complex state regulatory scheme, when federal judicial intervention in the dispute is not necessary to provide relief to the Plaintiff prisoner class in a local jail and a state court proceeding involving identical issues and identical parties is pending?

4. Whether state officials who have no supervisory responsibility over local jails can be held liable for unconstitutional conditions in a local jail under *Wilson v. Seiter*, ___ U.S. ___, 111, S.Ct. 2321 (1991) because they (1) did not construct or acquire additional capacity in the state prison system beyond that appropriated for by the state legislature and (2) did not further expedite the release of convicted felons in the state prison system, given a context of unsettled state law on their responsibility (if any) for convicted felons in local jails and federal court orders limiting the use of state prison capacity?

5. Whether, under principles of federalism, a federal district court abuses its discretion in setting a constitutional cap in a local jail at design capacity pursuant to state law and previous consent decrees without adopting a "wait-and-see" approach to determine whether, in operating beyond design capacity, jail officials will be deliberately indifferent to the significant human needs of the inmate class?

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No. ____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM 1991

ANN RICHARDS, GOVERNOR OF TEXAS, ET AL.
Petitioners

v.

THE SHERIFF OF HARRIS COUNTY, ET AL.
Respondents

v.

LAWRENCE R. ALBERTI, ET AL.
Respondents

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit reviewing the district court's orders finding liability against state officials and ordering state officials to compensate Harris County is attached hereto as Appendix A. *Alberti v. Sheriff of Harris County v. Richards*, 937 F.2d 984 (5th Cir. 1991). The order of the panel denying the state's motion for panel rehearing is attached as Appendix B. The district court's findings of liability against State Defendants are attached as Appendices J and X. The initial order requiring state officials to compensate Harris County is attached as Appendix R. Other district court opinions and orders are attached as Appendices D-Q, S-W and Y.

JURISDICTION

The judgment of the Court of Appeals was entered on July 25, 1991. A timely filed motion for panel rehearing was denied on October 22, 1991. This petition for writ of certiorari is filed within 90 days of the final judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. *CONSTITUTIONAL PROVISIONS*:

Article III, § 2, cl. 1 in pertinent part:

> The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States . . .

Art. VI, cl. 2

> This Constitution and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the land . . .

Eighth Amendment:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Eleventh Amendment:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or presented against one of the United States by citizens of another state; or by citizens or subjects of any foreign state.

B. *STATUTORY PROVISIONS*:

Tex. Code Crim. Proc. art. 104.002 in pertinent part:

> [A] county is liable for all expenses incurred in the safekeeping of prisoners confined in county jails or kept under guard by the county.

Tex. Gov't Code § 499.071 (formerly Tex. Rev. Civ. Stat. Ann. art. 6166a-4) is attached as Appendix Z.

I.

STATEMENT OF CASE

A. PETITION INVOLVES FEDERALISM ISSUES OF NATIONAL SIGNIFICANCE

This controversy swirls around whether Texas prison officials and the Governor of Texas (hereinafter "State Defendants") bore any liability, especially financial liability, for felons sentenced to the state prison system but confined and maintained in the Harris County jail. State Defendants do not dispute the Fifth Circuit's analysis that this is "*exclusively*" a state law issue and that it presented a "*hard question*" for the court. Appendix ("App.") A 18. Rather State Defendants maintain that federal courts, especially in a suit between two different levels of state government and involving complex

state regulatory policies, lack authority to decide these "*hard questions*" of "*exclusively*" state law. This is especially so since the dispute involved primarily the fiscal question of compensation to the counties which should only have been resolved on the terra firma of Texas politics in the Texas legislature. At the very least, under abstention doctrine, federal courts should have deferred to state courts to avoid decision on the difficult constitutional questions concerning State Defendants' liability under the Eighth Amendment and their immunities under the Eleventh Amendment. State Defendants also challenge the ruling below setting the constitutional capacity of the Harris County jail as its design capacity.

Litigation concerning prison and local jail overcrowding is tragically chronic in our society. The proper role of federal courts in resolving those disputes is therefore of profound importance to the nation.

B. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

These issues arise from *Lawrence Alberti v. The Sheriff of Harris County*, No. 72-H-1094, Southern District of Texas, a class action suit alleging constitutional violations brought under 42 U.S.C. § 1983 by prisoners in the Harris County (Houston) jail against the Sheriff of Harris County, certain of his employees and the members of the Harris County Commissioners Court (hereinafter "County Defendants"). County Defendants in early 1989 filed a Third Party complaint against Petitioners herein seeking to have the Texas Department of Corrections ("TDC" now called the Texas Department of Criminal Justice-Institutional Division or "TDCJ-ID") accept inmates sentenced to TDC but awaiting transfer in the Harris County jail.

On September 25, 1989, the *Alberti* court, determining the merits-liability aspect of the case,[1] found the jail unconstitu-

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[1]The Fifth Circuit had previously ordered "the transfer, to the judge

(footnote continued on next page)

tional and on the basis of its interpretation of *state law*, held State and County Defendants jointly liable for its unconstitutionality. App. X 29. On February 7, 1991 the *Alberti* court ordered the transfer to other county jails of certain prisoners ready for transfer to TDCJ-ID. These inmates were to "continue to be Harris County prisoners," but, under the terms of the order, Harris County was to be compensated by State Defendants (at a rate up to $40 per inmate per day) for expenditures incurred as a result of the transfers. App. R 6. The district court went on to rule that in light of the unsettled nature of state law the assessment of costs was "tentative" and "contingent" upon the outcome of state court litigation and whether sentencing alternatives were implemented in Harris County. App. R 7.[2]

The Fifth Circuit provisionally approved the decision of the lower court but remanded for findings in light of *Wilson v. Seiter*, ___ U.S. ___, 111 S.Ct. 2321 (1991).[3] To date, State Defendants have deposited *$6,750,000* into the registry of the district court. App. R 6; App. N; App. K; App. J 1; App. H; App. G 2; App. F; App. E 2. County Defendants have requested the deposit of an additional *$4,572,285.25*. It is not known whether this represents the total amount which the taxpayers of the State of Texas must pay, without state legislative authoriza-

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(footnote continued from previous page)
presiding over the *Ruiz* case [*Ruiz v. Collins*, No. 78-H-987-CA (S.D. Tex., Houston Div.), the state prison conditions case], of so much of the remedy portion of the *Alberti* third-party action . . . as seeks to enjoin them to receive or take prisoners to TDC confinement or to otherwise take action in the operation or management of TDC-operated confinement facilities." *In Re Clements*, 881 F.2d 145, 153 (5th Cir. 1989).

[2]In a Memorandum Opinion, the *Ruiz* court indicated it would have abstained on the issue of compensation to the counties. App. S.

[3]The district court has entered an order finding deliberate indifference and thus liability against State Defendants. App. J. That finding is currently the subject of a consolidated appeal in the Fifth Circuit styled *Alberti v. Sheriff of Harris County v. Richards*, Fifth Circuit Nos. 91-2946, 91-6062, 91-6206.

tion, to their own political subdivision pursuant to orders of the federal judiciary.

C. STATEMENT OF FACTS

1. State Law Prior to H.B. 93[4] Was Unsettled as to Liability and Financial Responsibility of State Defendants For Transfer Eligible Inmates in Harris County Jail

It is difficult to seriously contend that state law before August of 1991 was settled as to the liability or financial responsibility of State Defendants for prisoners in local jails. Two sections of the Local Government Code, TEX. LOCAL GOV'T CODE §§ 351.001 (Vernon Supp. 1992) and 351.041 (Vernon 1988), vest responsibility for county jails in the county commissioners courts and the sheriffs, respectively. Moreover, prior to August of 1991, state statutory law was unequivocal in making the counties financially responsible for all prisoners in their jails:

> "[A] county is liable for *all* expenses incurred in the safekeeping of prisoners confined in county jails or kept under guard by the county."

TEX. CODE CRIM. PROC. art. 104.002 (Vernon Supp. 1992) (emphasis added). In fact, prior to August 1991, the Texas Legislature had on three occasions failed to pass bills to compensate Texas counties for holding convicted felons, as well as a constitutional amendment and accompanying legislation to require the State to reimburse local governments for any new State mandates. See State Defendants' Exhibits 4-8, introduced at the trial of October 22, 1990 and testimony at that trial transcript [tr.] vol. 1, pp. 122-124. Nor, prior to August 1991, had the legislature appropriated money for compensating the counties for holding such prisoners. *See* TEX. GEN. &

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[4]Vernon's Tex. Sess. Laws 1991, 2d Called Sess., Ch. 10, pp. 180-226 (hereafter, "H.B. 93") (eff. August 29, 1991).

SPECIAL LAWS 1989, Reg. Sess., Ch. 1263, pp. 5184-5200 (eff. June 16, 1989). The lack of appropriations to compensate the counties is evidence of the intent of the legislature, *see Bullock v. Calvert*, 480 S.W.2d 367, 370-71 (Tex. 1972); TEX. CONST., Art. VIII, § 6 (funds may not be drawn from the State treasury without a specific appropriation therefor). Under the state constitution, the legislature has plenary power over the counties. *See* TEX. CONST., Art. IX, § 1; *Robbins v. Limestone County*, 114 Tex. 345, 268 S.W. 915, 919-20 (1925); *Bass v. Fontleroy*, 11 Tex. 698, 706 (1854).

And while the district court attributed the unconstitutional conditions in the Harris County jail to a failure of TDCJ-ID to meet a state-law duty to accept inmates sentenced to it, *See* App. X 29, state law is explicit and abundantly clear that the state prison system has a duty to accept inmates "*only*" pursuant to former Tex. Rev. Civ. Stat. Ann. art. 6166a-4,[5] *see* App. Z, which requires the Texas Board of Criminal Justice to "develop, adopt and enforce an allocation formula" that allocates admissions to TDCJ-ID.[6] *See* TEX GOV'T CODE § 499.121 (Vernon Supp. 1992). In fact, repeatedly the district court ordered the State Defendants to "maintain" the allocation formula,. App. R 8; App. U 3; App. V 3, and acknowledged it was "adopted by State Defendants to protect the integrity of *Ruiz* [state prison conditions case, see *supra at* 5 n.1] orders and agreements." App. R 5.

2. Allocation Formula Was Lynchpin of Reforms Aimed at Controlling Local Jail and Prison Overcrowding.

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[5]Now codified as TEX. GOV'T CODE § 499.071 (Vernon Supp. 1992).

[6]This regulation is codified as Chapter 152 in Title 37 of the Texas Administrative Code (37 TAC §§ 152.1-152.3) (*See* App. AA for pertinent parts of the regulation). Under the current formula 149 inmates per week may be admitted from Harris County. *See* 16 Tex. Reg. 5261 (September 24, 1991).

The allocation formula was a component of H.B. 2335, the Comprehensive Criminal Justice Reform Act, TEX. GEN. & SPECIAL LAWS 1989, Reg. Sess. Ch. 785, pp. 3471-3558 (generally eff. September 1, 1991). Aside from insuring compliance with *Ruiz*, State Defendants have long maintained -- and the legislative history shows -- that H.B. 2335's primary purpose was to establish a system of financial incentives and disincentives directed at controlling front-end population pressures by providing state financing for sentencing alternatives while at the same time forcing local governments to fund the cost of their own transfer-eligible inmates.[7] State Defendants' Exhibit 49, trial of the week of August 14, 1989, the Report of the Texas House Appropriations Subcommittee on Prison Construction Alternatives (January 30, 1989), esp. at 10 (noting that the state of Texas should develop "a hard core bed allocation system for local governments" and "a system to discourage local governments from sending criminals to the hard-core beds owned and operated by the state . . . beyond the allocation system"). Thus, the recent Report of the *Alberti* Special Master aptly summarized H.B. 2335 by saying at 4 that it "institutionalized the allocation formula, with its explicit cap on admissions to TDCJ, and encouraged the development within the counties of a wide range of both institutional and community-based alternatives to incarceration for a broad class of sentenced felons convicted of essentially non-violent offenses."

It must be noted that State Defendants have consistently and persistently maintained that Harris County underutilizes

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[7]Texas has, of course, also maintained an aggressive prison construction program that is almost unprecedented in scope: "Since 1984, the State has brought 22,299 new prison beds on line, 13,270 of them in 1989 and 1990. In 1989, the State further committed itself to the construction of 15,550 more beds. . ." *See* Report of December 13, 1991 by the *Alberti* Special Master on Harris County sentencing practices (hereinafter "Report of *Alberti* Special Master", copies lodged with Clerk of the Court) at 3. In addition, H.B. 93, Sec. 22.03, p. 224, appropriated $672,100,000 for the construction of 25,000 additional beds. This makes a grand total of 62,849 beds either built or funded for construction since 1984.

intermediate sanctions and takes a disproportionate number of state prison beds. *See*, trial of week of August 14, 1989, tr. vol. 3, pp. 534-572.[8] The Report of the *Alberti* Special Master on Harris County's sentencing practices has confirmed this. (*See* copies lodged with the Clerk of the Court.) Especially in light of these facts, State Defendants have contended that the allocation formula should not have been overridden, so that it would have had its natural effect of encouraging the use of sentencing alternatives in Harris County, as the Texas legislature intended.

3. State District Court Judgment Relied on By the Fifth Circuit Has Been Vacated Without Ever Being Reviewed By State Appellate Court, Let Alone Affirmed

Both the Fifth Circuit and the district court sought to resolve these complex issues of state law by reliance on § 1.02 of H.B. 2335[9] resting "primary responsibility" in TDCJ for "the confinement, supervision and rehabilitation of felons." App. A 24-25; App. X 29. In doing so, the Fifth Circuit noted its reliance on the only state district court to have addressed the issue. App. A 25-26.

However, the state cases[10] raised not only complicated issues of state court jurisdiction and complex factual issues but overarching separation of powers issues under Article II § 1 of

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[8]*See Also* Affidavit of Steve Martin (with summary) concerning the Harris County criminal justice system, admitted into evidence at the trial of February 27, 1990 as part of State Defendants' Exhibit 17 (copies lodged with the clerk of the Court).

[9]Now codified as TEX. GOV'T CODE § 493.001 (Vernon Supp. 1992).

[10]*County of Nueces v. Texas Board of Corrections*, No. 452,071 (Dist. Ct. of Travis County, 250th Judicial Dist. of Texas, pending); *Harris County v. State of Texas*, No. 465,468 (Dist. Ct. of Travis Co., 126th Judicial District of Texas, pending). Both of these were decided by the same state district court judge.

the Texas Constitution.[11] Moreover, under state law, because state entities were involved, the state court judgment on appeal (*Nueces County*), was superseded or automatically stayed. *Ammex Warehouse Co. v. Archer*, 381 S.W.2d 478, 481-82 (Tex. 1964). Before that case could be argued, let alone decided on appeal, the counties involved, as well as Harris County, agreed to vacate their judgments and settle pursuant to H.B. 93. *No state appellate court, let alone the Texas Supreme Court, has ever ruled on the issues presented to and decided by the Fifth Circuit.*

4. Legislative History of H.B. 93 and State Court Settlements Indicate State Was Liable for Prisoner Transfers Only After October 1, 1991

After intense lobbying by Texas counties, the Texas Legislature in August, 1991 passed H.B. 93, a law which provides for compensation to the counties for housing inmates sentenced to TDCJ-ID at amounts specifically set by the Legislature. TEX. GOV'T CODE § 499.122-499.125 (Vernon Supp. 1992). Moreover, as of October 1, 1991 a mechanism was established for transferring, at state expense, inmates to other county jails when a county jail has been declared unconstitutionally overcrowded and over 20 percent of its population is made up of inmates awaiting transfer to TDCJ-ID. TEX. GOV'T CODE § 499.125 (Vernon Supp. 1992). The legislative history of H.B. 93 indicates that an earlier version of H.B. 93 contained a provision that would have allowed compensation under state law from February 7, 1991, the date of the *Alberti* court's original order. S.B. 24 (introduced in the First Called Session) § 14.02, p. 34, proposing Tex. Gov't Code § 499.123(b) (*see* copies lodged with the Clerk of the Court). That provision was dropped, indicating that the Legislature's

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[11]Copies of State Defendants' Brief in *Texas Board of Criminal Justice, et al v. Nueces County, et al.*, No. 3-90-282-CV (3rd Court of Appeals - Austin, Texas) have been lodged within the clerk of the court for the Court's convenience.

intent was not to compensate Harris County prior to October 1, 1991. *Smith v. Baldwin*, 611 S.W.2d 611, 616-17 (Tex. 1981).

In order to qualify for the provisions allowing compensation, a county had either to dismiss its state court suit or settle. TEX. GOV'T CODE § 499.126 (Vernon Supp. 1992). Harris County entered into a settlement agreement (copies lodged with Clerk of the Court) consistent in all respects with H.B. 93. Hence, with the passage of H.B. 93, Harris County entered into a court settlement allowing transfer payments only after October 1, 1991 pursuant to the provisions of H.B. 93. Still, despite the language of the district court that the assignment of costs was "contingent" on the outcome of the state court litigation, the lower courts continue to require State Defendants to compensate Harris County for inmates transferred prior to October 1, 1991 and in derogation of the provisions of H.B. 93.

5. County Had Full Authority and Ability to Provide Remedy to Inmate Class.

It is indisputable that the County had and still has full authority under Texas law to contract with other counties and transfer prisoners out of its jail to detention facilities in those counties. Tex. Gov't Code Ch. 791 (*see* esp. § 791.003 (3)(A)), enacted by Vernon's Tex. Sess. Laws 1991, Ch. 38, § 1, pp. 461-466 (eff. September 1, 1991), superseding Tex. Rev. Civ. Stat. art. 4413(32c); TEX. LOCAL GOV'T CODE §§ 351.031-351.035 (Vernon 1988); Ch. 351, Subch. F & G (Vernon Supp. 1992); *see also* TEX. GOV'T CODE § 511.012(b) & (c) (Vernon 1990). Nor has there been any contention that the County lacked the financial resources to have made the contracts.

6. Constitutional Caps Are Set At Design Capacity (Based on State Law and Previous Consent Decrees) Not Constitutional Capacity, Which

Both the *Alberti* Special Master and State Expert Testified Was Substantially Higher.

The district court ruled that the design capacity (4,698 inmates) of the jail was its constitutional capacity because of the "poor physical design" of the jail and the lack of a "second means of egress from the Detention Center."[12] App. X 22. The *Alberti* Special Master testified that the 100 percent of design capacity limit was based on state statutes and the 1975 consent decree. *See*, trial of week of September 12, 1989, tr. vol. I, pp. 162-63, 165. These standards do not, according to the Special Master, necessarily establish a constitutional standard. *Id.* at 163-164. In fact, at a subsequent hearing, the *Alberti* Special Master testified that, although there was no special science to determining constitutional capacity levels, 5,500 to 6,000 was a range within which "we can hope" the county officials could operate the jail so as not to "trample on the constitutional rights of the prisoners." *See*, trial of week of August 14, 1990, tr. Vol. II, p. 14.

This testimony was corroborated by the state's expert, who explained that design capacity bears little relationship to constitutional capacity. For example, the *Ruiz* court orders routinely allow the Texas prison system to double-cell in forty-five square foot cells obviously designed only for one, allowing a significantly higher density standard for prisons under federal court order in Texas (long-term detention) than for jails (short-term detention) under state law. *See*, trial of week of August 14, 1989, tr. Vol. III, pp. 511-517. As a result, some units in Texas operate at 150 percent of design capacity under *Ruiz* court orders. *See*, trial of week of August 14, 1989, tr. Vol. III, p. 515. Similarly, the California system, which also is designed on a single-cell basis, can operate at 150 or 160

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[12]Harris County has added a second means of egress (firestairs) at the detention center. *See* County Defendants' Harris County Judge's, Harris County Commissioners' and Harris County Sheriff's Response and Objections to Monitor's July 23, 1990 Final Findings of Fact at 5.

percent of design capacity apparently without constitutional problems. *Id.*

By contrast, the Harris County central jail single-cells at least 30 percent of its population in fifty-square-feet cells which are larger than many cells at TDCJ-ID that are commonly double-bunked. *See* State Defendants' offer of proof of March 1, 1990; *see also* H.B. 93, Section 13.01, p. 208, amending Tex. Local Gov't Code § 351.006(d). It is not surprising, then, that after his third tour of the jail, the State's expert testified that the Harris County jail could be constitutionally managed at a population ranging between 5,500-6,000, the same as the *Alberti* Special Master's suggested range. *See*, trial of week of August 14, 1990, tr. vol. II, p. 78.

In fact, the *Alberti* court for the period of February 7, 1991 to December 2, 1991, routinely maintained a cap of 6,300. App. R 6; App. P 3; App. I 2. Subsequent orders indicate, however, that design capacity will be the trigger for H.B. 93 transfers from Harris County facilities in existence at the time of trial and likely will be the constitutional capacity for new facilities even though no hearing was even held on their constitutional capacity. App. D; App. E.

REASONS FOR GRANTING THE WRIT

I.

THERE ARE SPECIAL AND IMPORTANT REASONS TO GRANT THE WRIT.

A. CERTIORARI SHOULD BE GRANTED TO RESOLVE AN IRRECONCILABLE CONFLICT BETWEEN THE CIRCUITS OVER (1) THE ROLE OF FEDERAL COURTS IN DECIDING DISPUTES BETWEEN DIFFERENT LEVELS OF STATE GOVERNMENT AND (2) THE SCOPE OF THE ELEVENTH AMENDMENT.

This case arose in the context of an internal political dispute between the Texas legislature and the counties of Texas over whether counties should be compensated for housing inmates ready for transfer to the state prison system. Prior to the passage of H.B. 93, that debate raged in the Texas legislature, often between representatives of the state's rural and urban counties:

> Without reducing to a disagreement between you and I individually, kind of globally the problem with that is, you have judges in Harris County that are making decisions that raise my taxes, as he indicated earlier. And we've gone to an extensive amount of time and trouble to try to establish this. Harris County has about 19[13] percent of the State's population, produces about 20 percent of the State's tax revenue stream. It consumes 28 to 30 percent of the prison resources.
>
> When your locally elected judge in Harris County makes a decision about what to do with the criminal, in excess of that 20 percent, taxes in Dallas and Bexar and Parker County go up to pay for that decision . . .

Meeting of the Appropriations Committee of the Texas House on February 21, 1991, Remarks by Representative Ric Williamson of Parker County (Weatherford) in colloquy with Representative Paul Hilbert from Harris County (Houston) (transcript of remarks lodged with the Clerk of the Court).

The Fifth Circuit showed no hesitancy to intrude directly into the center of this political dispute, likening its orders to a "lion in the street" when the Texas legislature passed H.B. 93 in August, 1991. App. B 3. And, *after* deciding the "*hard questions*" of "*exclusively*" state law against Texas, the

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[13]The evidence in this case indicates 16 percent. See Affidavit of Steve Martin (lodged with the clerk of the Court) at 22.

Fifth Circuit found the state to be a constitutional violator, thereby sidestepping, without discussion, its authority to decide the state-law dispute in the first place. App. A 35 n.8. This merely begs the question: Did the Fifth Circuit have authority under Article III[14] and principles of federalism to decide a state-law dispute between two state governmental entities?

In contrast, to the Fifth Circuit's approach -- headlong into the melee -- the Sixth Circuit has ruled under principles of federalism that federal courts lack authority "to adjudicate an internal dispute between a local governmental entity and the very state that created it." *Kelly v. Metropolitan Board of Education of Nashville and Davidson County, Tennessee v. State of Tennessee*, 836 F.2d 986, 998 (6th Cir. 1987), *cert denied*, 487 U.S. 1206 (1988). And, again in contrast to the Fifth Circuit's approach, numerous decisions of this Court and the Circuit courts have ruled that local governmental entities lack standing to bring an action in federal court against their creator.[15]

The reasoning of the Sixth Circuit rests primarily on a prudent and pragmatic deference[16] to state governments in finding their own means of funding a remedy when a constitutional violation occurs:

> Again, however, the existence of a duty to eliminate [the constitutional violation] does not mean that the duty may only be discharged through taxes levied by the state, as opposed to taxes levied by the counties of the state. This

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[14]If Congress cannot tell a state where to locate her capital, how, under Article III, can a federal court tell a state that it must compensate its counties? *See Coyle v. Smith*, 221 U.S. 559 (1911).

[15]*E.g., Coleman v. Miller*, 307 U.S. 433, 441 (1939); *South Macomb Disposal Authority v. Township of Washington*, 790 F.2d 500 (6th Cir. 1986); *Town of Ball v. Rapides Parish Police Jury*, 746 F.2d 1049, 1051 n.1 (5th Cir. 1984) (and cases cited therein).

[16]State Defendants maintain, of course, that this deference is anchored in the Constitution, including the Tenth and Eleventh Amendments.

> "constitutional wrongdoers must pay for their wrongs" argument has little or no force where we are talking about two political entities, a state and one of its subdivisions, each of which has done wrong (as have subdivisions not now before us) and where the men and women representing the electorate of the state as a whole -- an electorate that includes the voters of all subdivisions -- have chosen not to enact legislation shifting to the state as a whole the costs of repairing the wrongs within each subdivision.

Kelly, 836 F.2d at 998. In fact, this Court has traditionally shown great deference to the states in regards to issues that involve statewide systems relating to the fundamental structure of the state's fiscal and taxing policies, public administration and local initiative. *See e.g.*, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 40-41 (1973). *Kelly* relied on *Rodriguez* heavily in its reasoning. *Kelly*, *supra* at 996-997.

Yet here, federal courts construed, without authoritative state court interpretation, § 1.02 of H.B. 2335 as carte blanche authority to acquire at state taxpayers' expense a special prison system for one locality, despite that locality's disproportionate use of state prison space. This federally ordered, but state financed, capacity acquisition required expenditures beyond the funding appropriated by the Texas legislature for construction and acquisition of prison capacity. This is simply not the office of federal courts:

> Such fundamental decisions as how many prisons to build and how large to build them -- basic decisions regarding the allocation of public resources are simply outside the domain of federal courts.

Inmates of Occoquan v. Barry, 844 F.2d 828, 843 (D.C. Cir. 1988).

Similarly, the Fifth Circuit's willingness to enter into the fray and decide "*hard questions*" of "*exclusively*" state law against the State Defendants led it to conclude that the money payments to the County were incidental to injunctive relief. App. A 35. Bootstrapping again its state law decision, it sought to distinguish *Kelly* by ruling that the state was a "current constitutional violator." App. A 35. But as noted above, this distinction begs the question. *Kelly* rests primarily on the proposition that it is not the province of federal courts to decide at all that kind of state-law dispute between different state subdivisions. Rather, relying on *Rodriguez*, *Kelly* would leave such matters to the state political process, *Kelly*, *supra* at 996-997, and not engage in an "'end-run around the . . . legislature's allocation of state funds'." *Kelly*, *supra* at 995 *citing United States v. Texas Education Agency*, 790 F.2d 1262, 1265 (5th Cir. 1986), *cert. denied*, 479 U.S. 1030 (1987).

Accordingly, *Kelly* found, under Eleventh Amendment analysis, that "[t]he order to pay is ancillary only to itself" *Kelly*, *supra* at 992, and, as such, violated settled precedents holding that, "[w]hen the action is in essence one for the recovery of money from the state, the state is the real substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Kelly*, *supra* at 988-89 citing *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 464 (1945); *see also Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 101 (1984). This in turn is consistent with long-standing case law counseling, under Eleventh Amendment analysis, non-interference with the fiscal affairs of of states. *See e.g., Employees v. Missouri Department of Public Health and Welfare*, 411 U.S. 279 (1973); *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 577 (1946).

The reasoning of the *Kelly* case applies with particular force where, as here, vindication of the constitutional rights of the Plaintiffs could have been achieved without involving the

state at all, while leaving the local governmental entity free to pursue its relief before the state legislature or in state court.

> It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states. "The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that *such relief should be denied in every case where the asserted federal right may be preserved without it."*

Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 298 (1943), *quoting Matthews v. Rodgers*, 284 U.S. 521, 525 (1932). (emphasis added)

Especially in an era of tightening budgets, the role of federal courts in resolving fiscal disputes between different levels of state government raises fundamental questions of federalism. Hence, the irreconcilable conflict between the Fifth Circuit and other circuits as to how to approach this problem is important, and this Court should resolve it.

B. CERTIORARI SHOULD BE GRANTED BECAUSE OF THE LOWER COURT'S CLEARLY ERRONEOUS AND ILL REASONED RULING ON ABSTENTION.

1. Abstention Was Especially Appropriate Because of Ongoing State Court Proceedings Dealing With Undecided Issues of State Law.

Few cases cry out so much as this one for some principled discussion of federalism, particularly this Court's decision in *Railroad Commission v. Pullman*, 312 U.S. 496 (1941). Although acknowledging that this case presented a "*hard ques-*

tion" of "*exclusively*" state law, App. A 18, the panel was simply flat-footed on abstention, noting only that it did not "quite fit", App. A 35, despite this Court's clear message that such stingy judicial "pigeonholing" is not appropriate in abstention analysis. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 n.9 (1987). Judge Higginbotham, no novice at federalism, has himself noted, in a case which formed the gravamen of his analysis here, that if there is "real ambiguity" about statutory intent or state law, "strong" grounds for *Pullman* abstention exist. *Bush v. Viterna*, 795 F.2d 1203, 1205 n.1 (5th Cir. 1986).

There can be little question, especially in light of H.B. 2335 and the allocation formula, that at the very least there was "real ambiguity" as to whether or not the intent of state law was for TDCJ-ID or other state entities to assume responsibility for transfer-eligible inmates in local jails prior to the passage of H.B. 93. Certainly, given the stakes of the state law dispute in terms of the state's criminal justice policies, its relationship with its counties[17] and the obvious fiscal implications for the state, abstention under *Pullman* was appropriate.[18]

The argument for abstention is especially compelling in light of the pendency of a state court action involving the identical state and county parties. *See Pennzoil Co. v. Texaco,*

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[17]Even assuming *arguendo* federal courts have authority to resolve a state law dispute between two state governmental entities, abstention would still seem the better course. Deference to state institutions is especially appropriate, "when it is proposed that the remedial powers of the federal courts be exercised 'to restructure the operation of local and state governmental entities.'" *Kelley*, 836 F.2d at 1000, *citing Hills v. Gautreaux*, 425 U.S. 284, 293, (1976). *See also Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977) ("the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs").

[18]Because this is a Texas case, the proper course was to dismiss State Defendants or at least any claims relating to State Defendants' liability and financial responsibility for transfer-eligible inmates in the Harris County jail. *Harris County Commissioners Court v. Moore*, 420 U.S. 77, 88-89 (1975).

Inc., 481 U.S. 1 (1987); *Younger v. Harris*, 401 U.S. 37 (1971). In fact, "wise judicial administration" would have counseled in favor of dismissing State Defendants to conserve the resources of the courts and the parties. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-20 (1976).

The Fifth Circuit's "deference" to these ongoing state court proceedings and the district court's "contingent" enforcement of its orders, *see* App. A 26, App. R 27, are a far cry from the considerations of federalism embodied in the abstention doctrine. Here those state court proceedings had either been "superseded" or stayed on appeal[19] (as in *County of Nueces*) or had not even been fully litigated in the trial court. Litigants should not be able to use a federal court to make an end run around normal state judicial processes. *See Pennzoil*, 481 U.S. esp. at 13-14. Nor should they disrupt the ordinary process of trial or appeal in state court by adjudicating a civil rights case in which the federal constitutional claims are "inextricably intertwined with the state court's grant or denial of relief." *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482-84 n.16 (1983).

Moreover, the whole idea of "contingent" liability raises the very justiciability problem which the *Pullman* doctrine was designed to avoid:

> When federal courts interpret state statutes in a way that raises federal constitutional questions,

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[19]The basis for the automatic stay on appeal was precisely because the judgment was against a state entity and issues of sovereign immunity were implicated. *Ammex*, 381 S.W.2d at 481-82. Given this Court's decision in *Pennhurst*, it would have seemed particularly advisable under the Eleventh Amendment to have deferred to the normal state practice set forth in *Ammex*. *Cf. Will v. Michigan Department of State Police*, 491 U.S. 58, 65 (1989) (considerations based on the Eleventh Amendment can be applied in other contexts involving the constitutional balance between states and the federal government). Non-interference with the stay and normal state court process was also mandated by 28 U.S.C. § 2283.

> "a constitutional determination is predicated on a reading of the statute that is not binding on state courts and may be discredited at any time -- thus essentially rendering the federal court decision advisory and the litigation underlying it meaningless."

Pennzoil, 481 U.S. at 11, *citing Moore v. Sims*, 442 U.S. 415, 428 (1979). And here that prophecy has been sadly fulfilled, for the entire state-law basis of the Fifth Circuit's opinion has evaporated with the vacation of the judgments in state court pursuant to the settlement of the state court actions under H.B. 93.

2. Abstention was Appropriate to Avoid Disruption of State Regulatory Programs.

The lower courts' assumption of jurisdiction over the claims against State Defendants also violated the doctrine of *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), which calls for abstention when such jurisdiction interferes with a complex state regulatory scheme. *See also Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976) (federal courts must abstain to avoid adjudication that would be "disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern").

Requiring State Defendants to finance the housing of transfer-eligible inmates in other counties implicated (and, in fact, undermined), the important public policy objectives of the allocation formula under H.B. 2335 by *de facto* giving Harris County additional numbers above its current allocation.[20] It also went at cross-purposes to the manifest intent of H.B. 2335 to encourage the use of intermediate sanctions and alternatives to incarceration because it removed from Harris County the

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[20]The allocation formula is, of course, subject to state court judicial review under the Texas Administrative Procedure and Texas Register Act, TEX. REV. CIV. STAT. ANN. art. 6252-13a § 12 (Vernon Pamph. 1992).

financial burden of supporting inmates sentenced to state prison in excess of Harris County's allocation.[21]

In fact, the entire process of federal review in this case involves consideration of a wide variety of public policy decisions in the Texas criminal justice system which are discretionary in nature. These include (but are not limited to) how many prison beds to construct, how many to contract for, how much good time to award (either under the Prison [or Population] Management Act [PMA],[22] or by prison officials), or how many inmates to furlough. These discretionary decisions were all the subject of state court review in both the *Nueces* and *Harris* county actions. And all of these functions and decisions implicate matters of substantial public concern and involve an attempt to maintain a coherent, state-wide criminal justice policy. Federal courts, accordingly, should have refrained from reviewing these issues under a hybrid *Burford-Younger* type of abstention. *Cf. Pennzoil*, 481 U.S. at 11-12 and 15-17 (justifying abstention in light of Art. I, § 13 of the Texas Constitution, the "open courts" provision).

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[21]In addition, requiring State Defendants to pay the costs of contracts with private vendors or counties for jail space interfered with or superseded the bidding process for such contracts required by TEX. GOV'T CODE § 495.003 (Vernon Supp. 1992).

Moreover, the order circumvented the 1987 Appropriations Act which limited the number of beds that the State could contract out for under former article 6166g-2 (Vernon's Texas Civil Statutes) to 2,000. TEX. GEN. & SPECIAL LAWS 1987, 2d Called Sess., Ch. 78, paragraph 49, p. 343 (eff. August 6, 1987). Before H.B. 93, there were no additional appropriations to allow the TDCJ-ID to contract out for more beds, nor any change in the 1987 rider limiting the number of beds. And as the testimony showed at the hearing in this case of the week of August 14, 1989, TDCJ-ID had already contracted out for all 2,000 beds. See tr. vol 4, pp. 674 & 746.

[22]Formerly codified as Tex. Gov't Code, Ch. 498, Subch. B, now re-codified as Tex. Gov't Code, Ch. 499, Subch. B, by Vernon's Tex. Sess. Laws 1991, Reg. Sess., Ch. 16, Section 10.01, pp. 301-304 (eff. August 26, 1991), amended by H.B. 93, Section 17.02, pp. 215-217.

The PMA was itself the subject of a state constitutional attack in Texas courts. *See* Appellants' Brief in *County of Nueces* case (lodged with the Clerk of the Court) at pp. 37-38.

3. If Abstention Was Not Appropriate, the Fifth Circuit Should Have Stayed Further Action Against State Defendants While Certifying the Relevant Questions of Law to the Texas Supreme Court.

Certainly, if abstention for some reason was not appropriate, the Fifth Circuit should have certified the relevant questions concerning the State's liabilities and financial responsibility to the Texas Supreme Court in accordance with TEX. R. APP. P. 114. *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974) (certification appropriate in light of the "great unsettlement" of state law).

C. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE IF, IN THE CONTEXT OF UNSETTLED STATE LAW AND FEDERAL COURT ORDERS IN THE STATE PRISON CONDITIONS CASE, STATE OFFICIALS WITH NO SUPERVISORY AUTHORITY OVER LOCAL JAILS ARE LIABLE UNDER *WILSON V. SEITER* FOR CONDITIONS OF CONFINEMENT IN A LOCAL JAIL BECAUSE THEY (1) DID NOT CONSTRUCT OR ACQUIRE MORE BEDS THAN THE LEGISLATURE APPROPRIATED FUNDING FOR AND (2) DID NOT EXPEDITE THE RELEASE OF MORE CONVICTED FELONS.

In analyzing State Defendants' liability under *Wilson v. Seiter*, the Fifth Circuit found that there was "no doubt that the relevant state officials knew that ready felons were being backlogged despite the objectively cruel conditions in the county's jails." App. A 30. However, there is nothing in the record to suggest that state officials on the prison board or the Governor had even inspected the Harris County Jail, let alone knew of conditions there prior to the time of trial in September 1989

when the state's expert toured the jail. Certainly there is no state law vesting any direct supervisory authority in state officials for conditions in the local jail. Absent a showing of direct supervisory responsibility over local jails, state officials should not be held liable for conditions in those jails. *Rizzo v. Goode*, 423 U.S. 362, 375-76 (1976); *Bush v. Viterna*, 795 F.2d 1203 (5th Cir. 1986).

Moreover, since State Defendants' duties under state-law are at best unsettled, that lack of clarity is itself an insurmountable obstacle to a finding of the requisite mental state under *Wilson v. Seiter*. *Cf. Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (state officials liable for monetary damages only if their conduct violates "clearly established . . . constitutional rights of which a reasonable person would have known"), *see also Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (in order to overcome qualified immunity "unlawfulness must be apparent").

Still, the Fifth Circuit moved forward with its analysis under *Seiter*, positing two methods in which State Defendants could have fulfilled its obligations despite the existence of constrictions on the state system under *Ruiz*.[23] App. A 30. First, state prison officials and the Governor could have simply built or contracted for more beds. *Second*, state prison officials and the Governor could have expedited the release of more *convicted felons* under the Prison Management Act to ease overcrowding at the local level, thereby providing more room for the county's *misdemeanants* and *pretrial detainees*.

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[23]Under *Ruiz* State Defendants must maintain system-wide capacity at 95%. *See*, trial of week of August 14, 1989, tr. vol. 4, p. 661. This is, however, a court-ordered capacity level, not a design capacity. See *supra* at 12-13. There is no dispute that TDCJ-ID operated at or near its court-ordered capacity at all times. *Id. Ruiz* orders, of course, take precedence under the Supremacy Clause (Article VI, cl.2) over any state law duty to accept inmates. *See U.S. v. District of Columbia*, 897 F.2d 1152, 1156 (D.C. Cir. 1990) (court-ordered population caps override statutory obligation to accept inmates); *see also Cooper v. Aaron*, 358 U.S. 1 (1958).

As to the first method, expansion of capacity, TDCJ has vigorously carried out its legislative mandate to expand state prison capacity[24] up to the limits of its appropriations. *See*, trial of week of August 14, 1989, tr. Vol. 4, pp. 741-760; trial of week of February 27, 1990, tr. Vol. 1(A), pp. 184-193, esp. 193. There were thus no unspent appropriations for the additional military-style boot camps or tent cities suggested by the Fifth Circuit. App. A 30. This is also true for contracted capacity. *See supra* at 22 n.21. *Wilson v. Seiter* left open the issue of a "cost" defense based on the inability to obtain funding. *Seiter*, ___ U.S. at ____, 111 S.Ct. at 2326. This Court, on the specific facts of this case, must now affirm such a defense because the Texas Legislature specifically resolved under H.B. 2335 to build a set number of beds and allocate that capacity. Under the Eleventh Amendment and principles of federalism, federal courts may not interfere with such basic resource allocation decisions of state government. *See Pennhurst*, 465 U.S. at 101; *Inmates of Occoquan*, 844 F.2d at 843. Moreover, *Ruiz* court orders (*see* "Crowding Stipulation", Section IV. D., State Defendants Exhibit 24, trial of week of August 14, 1989) prohibit the use of temporary housing[25] such as tent cities, and efforts to modify those orders have proved unsuccessful even under the flexible standard adopted by this Court in *Rufo v. Inmates of Suffolk County Jail*, No. 90-954, __ U.S. __ (1992). *Ruiz v. Lynaugh*, 811 F.2d 856, 857 & 862 (5th Cir. 1987).

The second method, expediting the release of convicted felons by awards of good time thereby enlarging the parole eligible pool, raises issues of a more pragmatic but troubling nature regarding public policy decisions in the state criminal justice system. Use of the Prison (or Population) Management

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[24]62,849 beds have been built or funded for construction since 1984. See *supra* at 8 n.7.

[25]In addition, state law currently prohibits the use of temporary housing. TEX. GOV'T CODE § 501.111 (Vernon Supp. 1992). It would seem that what type of prisons to construct, like how many to build and how large to build them, are basic resource decisions "simply outside the domain of federal courts." *Inmates of Occoquan*, 844 F.2d at 843.

Act (PMA) to reduce jail population levels would involve flushing large numbers of offenders out the back door of the state prison system, with the attendant threat to public safety and the dilution of the felony sanction because of extreme reduction in prison terms. *See*, trial of week of August 14, 1989, tr. vol. 4(A), pp. 840-861; State Defendants' Exhibit 53.

The PMA, however, has been used only as a means of complying with *Ruiz* capacity limitations since the PMA is triggered only when the population hits 95 percent of the court-ordered capacity. *See* former Tex. Gov't Code § 498.025(b).[26] *See also*, trial of week of August 14, 1989, tr. Vol. 1(A), pp. 176-77; vol. 4, pp. 676-679. It has never been used as means of controlling overcrowding in local jails. This is best illustrated by examining use of the PMA in light of the allocation formula.

Assuming a transfer-eligible population of 3,420 (the number in the Harris County jail at the time of the first trial, according to the County's witness[27]) and Harris County's current admissions allocation of 20-plus percent it would be necessary, assuming an evenhanded allocation of beds statewide, to release at least 17,000 inmates from TDCJ-ID to clear the transfer-eligible inmates out of the Harris County jail. The PMA was never intended as a means to obtain the wholesale release of convicted felons in order to clear out local jails. Rather, TDCJ-ID has used it in a prudent and reasonable fashion to comply with federal caps when they are exceeded. At the time of the first trial it had been triggered 12 times and a total of 560 days awarded. Trial of the week of August 14, 1989, tr. Vol. 4(a), pp. 855-856. If state officials are acting reasonably within the scope of their delegated functions under constitutional statutes, Eleventh Amendment analysis should bar federal judicial involvement. *See Pennhurst*, 465 U.S. at 101 n.11.

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[26]Now re-codified as Tex. Gov't Code § 499.025(b) by Vernon's Tex. Sess. Laws 1991, Reg. Session Ch. 16, § 10.01, p. 302 (eff. August 26, 1991), amended by H.B. 93, Section 17.02, p. 215.

[27]Trial of week of August 14, 1989, tr. Vol. 1(A), p. 241.

Accordingly, the limited use of the PMA as a means to control prison, not local jail overcrowding, cannot be reasonably argued as conduct establishing liability under *Wilson v. Seiter* given the state's interest in public safety and having convicted felons serve their terms. Indeed, the Fifth Circuit stayed an order that would have expedited felony releases when lesser offenders were available for release. App. C. And the *Alberti* court, no doubt with its own concerns of public safety, abandoned all release mechanisms, opting instead for ordering transfer-eligible inmates in the custody of Harris County Jail into other jails in the state. Given this history, it is difficult to hold State Defendants liable for exercising the same prudent reluctance to release convicted felons displayed by both the *Alberti* Court and the Fifth Circuit. At the very least, given their overriding concern for public safety, State Defendants' conduct should be held to the standard of "malicious or sadistic" intent in order for liability to be imposed. *Seiter*, ___ U.S. at ___, 111 S.Ct. at 2326. However, under whatever standard imposed, State Defendants' conduct cannot justify a finding of liability under *Wilson v. Seiter*.

D. CERTIORARI SHOULD BE GRANTED TO REVERSE AN ILL REASONED AND CLEARLY ERRONEOUS RULING OF FEDERAL CONSTITUTIONAL LAW ON CAPACITY LIMITATIONS AND TO PROVIDE GUIDANCE TO THE LOWER COURTS ON THE APPROPRIATE APPROACH TO TAKE IN IMPOSING CAPS ON LOCAL JAILS OR PRISONS.[28]

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[28]Under H.B. 93, the money to pay for transferring inmates from unconstitutionally overcrowded jails is appropriated to TDCJ. H.B. 93, Section 22.01(a), p. 223. TDCJ has the power to disburse the money to the Texas Commission on Jail Standards, the agency which actually makes the payments, through interagency contracts. *Id.* Any unexpended amounts may be used for the operation of substance abuse felony facilities, H.B. 93, Section 22.01(b), p. 224, which are run by TDCJ. Accordingly, TDCJ has standing to contest artificially low population caps in local jails since they result in the unnecessary disbursal of funds from TDCJ's budget. *See Watt v. Energy Action Educational Foundation*, 454 U.S. 151, 161 (1981).

State Defendants do not dispute the offensive and degrading conditions of confinement found in the Harris County jail at the time of trial. Still, the decision equating design capacity with constitutional capacity was precipitous and imprudent in light of this Court's traditionally deferential approach to prison and jail administration. *See e.g. Thornburgh v. Abbot*, 490 U.S. 401, 407-408 (1989); *Turner v. Safely*, 482 U.S. 78, 84-85 (1987); *Rhodes v. Chapman*, 452 U.S. 337, 351 & n. 16 (1981), *Bell v. Wolfish*, 441 U.S. 520, 540-541 n.23, 547 & n.29 (1979); *Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973). More specifically, this court has noted that the issue in a prison or jail case such as this "is not whether the designer of [the facility] guessed incorrectly about future prison population, but whether the conditions of confinement at [the facility] are cruel and unusual." *Rhodes*, 452 U.S. at 349-50 n.15; *see also Bell v. Wolfish*, 441 U.S. at 542 (rejecting 'one-man-one-cell' approach). Furthermore, state law standards, such as those of the Texas Commission on Jail Standards certainly cannot be dispositive in making this assessment under the Eleventh Amendment. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984); *see also Lelsz v. Kavanaugh*, 807 F.2d 1243, 1252 (5th Cir. 1987), *reh. denied*, 815 F.2d 1034 (5th Cir. 1987), *cert dism'd*, 483 U.S. 1057 (1987). Nor can the previous consent decree in this case be dispositive since State Defendants were not a party to it. *Martin v. Wilks*, 490 U.S. 755, esp. at 763 (1989).

Given this case law, the Fifth Circuit's resolution of this issue in *Ruiz v. Estelle*, 679 F.2d 1115, 1148 (5th Cir. 1982), *modified on other grounds*, 688 F.2d 266 (5th Cir. 1982) *cert. denied*, 460 U.S. 1042 (1983), where the court adopted a "wait and see" approach as to constitutional capacity levels, provides a far more appropriate compromise between constitutional interests of the inmate class and the traditional deference to be accorded prison and jail administrators. Setting caps based on design capacity is inappropriate, especially when there was substantial and credible testimony of experts (including the Special Master) that the jail could (and apparently did from February 7, 1991 to November 25, 1991) function tolerably at levels beyond

its design capacity. *See Youngberg v. Romeo*, 457 U.S. 307, 322-323 (1982) ("[W]e emphasize that courts must show deference to the judgment exercised by a qualified professional . . . [L]iability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment"); *see also New York State Ass'n For Retarded Children v. Carey*, 706 F.2d 956, 971 (2nd Cir. 1983). And, in light of *Wilson v. Seiter, supra*, any capacity level in which defendants are not "deliberately indifferent" to the significant human needs of the inmate class is sustainable.

Because overcrowding is a persistent and wide-ranging problem nationally, this Court should grant certiorari to establish clear guidelines for the lower courts on this issue.

CONCLUSION

For all of these reasons, a writ of certiorari should be granted now and this case set for argument. Alternatively, this petition should be deferred pending review in the Fifth Circuit of the *Alberti* court's finding of deliberate indifference. State Defendants request such other relief which this Court may deem just, fair and equitable.

Respectfully submitted,

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91-1202
(2)

No. ____

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IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM 1991

Ann Richards, Governor of Texas; Selden Hale, III, Mamie Moore Proctor, Hon. Clarence N. Stevenson, Allan B. Polunsky, James M. Eller, F. L. Stephens, Jerry H. Hodge, Joshua W. Allen, Sr., Ellen J. Halbert, Members, Texas Board of Criminal Justice; James A. Lynaugh, Executive Director, Texas Department of Criminal Justice,

Petitioners

v.

John Lindsay, Harris County Judge; El Franco Lee, Jim Fonteno, Steve Radack, Jerry Eversole, Harris County Commissioners; Johnny Klevenhagen, Harris County Sheriff,

Respondents

v.

Lawrence R. Alberti, Jimmy E. Collins, Henry C. Langer, Jose' J. Pina, II, Pat Reed, Wesley Sellers, individually and on behalf of all others similarly situated,

Respondents

On Petition for Certiorari
To the United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI
Appendices A-R

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APPENDIX A

Lawrence R. ALBERTI, et al.,
Plaintiffs-Appellees,

v.

The SHERIFF OF HARRIS COUNTY, TEXAS et al.,
Defendants-Third Party
Plaintiffs-Appellants, Appellees,

In re Ann RICHARDS,
the Governor of Texas, et al.,
Third Party Defendants-Appellants.

Nos. 90-2441, 90-6034, 91-2274 and 91-2801.

United States Court of Appeals,
Fifth Circuit.
July 25, 1991.

Before REAVLEY, HIGGINBOTHAM, and DUHE, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

This is another chapter in the now epic struggle of Texas with its bulging prisons. The reality is that the colloquial expression "state pen" has often been apt. Harris County, Texas, after many years of federal prodding, brought its jails into substantial compliance with constitutional standards. County jails in Texas house both county and state prisoners. A substantial portion of a county's jail population consists of prisoners destined for the state prison system. The struggle of Harris County for an adequate jail system was frustrated by the state's refusal to take its state prisoners. This delay served state penalogical goals, but its resulting success at the state level

came out of the hide of Harris County. Judge DeAnda of Houston and Judge Justice of Tyler have commendably presided over this intricate fracas, and we find today no errors in their effort. We are compelled to remand findings of county and state liability due to an intervening decision of the United Sates Supreme Court. We do so despite compelling evidence of state liability, and some evidence of county liability, only because the requisite fact-findings required by the new law were understandably not made and we decline to exceed our appellate role by supplying the findings.

I.

A. *Procedural background.*

It will soon be twenty years since Lawrence Alberti and his fellow prisoners filed a class action on behalf of past, present, and future inmates of Harris County jails. The complaint named members of the Harris County Commissioners Court and the Harris County Sheriff's Department as defendants and, pursuant to 42 U.S.C. § 1983, alleged that the jails' conditions violated numerous constitutional and statutory provisions.

The original district judge, Judge Bue, conducted extensive hearings, including visits to the facilities. He concluded that conditions in the jails were "inhumane." The plaintiffs and the county then entered into a consent decree on February 4, 1975. The decree called for renovations of existing facilities, the development of a new central jail, and improvements in staff and security. The district court retained jurisdiction to issue further interim orders, and shortly thereafter, on December 16, 1975, the court issued a lengthy opinion setting forth broad guidelines for the streamlining of the criminal justice system, the implementation of an effective pre-trial release program, and the improvement of living conditions within the jails.

At the time of the decree, the county's facilities consisted of a central jail, with a design capacity of 1150, at 301 San Jacinto and a detention center, with a design capacity of 810, in Humble, Texas. In 1982, spurred by the consent decree and later remedial orders, the county completed a new central jail, with a design capacity of 3505, at 1301 Franklin and closed the old central jail. Attendant staffing and supervision concerns were the subject of several additional orders by the *Alberti* court. *See Alberti v. Klevenhagen*, 606 F.Supp. 478 (S.D.Tex. 1985); *Alberti v. Heard*, 600 F.Supp. 443 (S.D.Tex. 1984). The county also commissioned an expert, Dr. Charles Friel, to consider future needs. Pursuant to his projections, the county authorized the construction of a third jail facility, with a capacity of 4000, at 701 North San Jacinto and the renovation of the old central jail, to house 400, at 301 San Jacinto.

The county filed a motion for final judgment and permanent injunction on February 20, 1987. Shortly thereafter, on April 28, 1987, the *Alberti* court appointed three monitors--a special master, a medical monitor-assessor, and a jail monitor-assessor--to periodically inspect the jails and to assess their conditions, to make findings on the county's compliance with its orders, and to determine the maximum capacities of the jails. *See Alberti v. Klevenhagen*, 660 F.Supp. 605 (S.D.Tex. 1987). The monitors issued their first report on October 7, 1987. Of the eighteen conditions surveyed, the monitors found full compliance as to nine, partial compliance as to seven, and non-compliance only as to two, medical and dental care and drug and alcohol treatment. The monitors also found that, as of June 1, 1987, the county's fails were only five percent over their design capacity. However, in light of the inordinate delay in achieving substantial compliance, the monitors recommended continued supervision by the *Alberti* court.

B. *The state's scheduled admissions policy.*

The state of Texas has been beset with its own overcrowding problems. In 1985, after many years of litigation

in *Ruiz v. Estelle*, the state entered into a "crowding stipulation," agreeing to limit the population in its prisons to 95% of capacity. *See Ruiz v. Lynaugh*, 811 F.2d 856 (5th Cir. 1987). To stay within the limits, the state periodically closed its prisons to convicted felons sentenced to the state's prison system, and ready for transfer, but awaiting transfer in county jails. In September of 1987, the state attempted to order the rationing with a "scheduled admissions policy," setting daily quotas on the number of ready-felons that it would accept into its prison system from each county.

As stated by the monitors, "[t]he painful consequences for Harris County of this new admissions policy quickly became evident." A backlog of ready-felons developed, and on December 17, 1987, the *Alberti* court directed the monitors to reassess the jails' conditions in light of the state's new policy. The monitors issued their report on March 21, 1988. They found that the jails were "clean, well-run, and reasonably safe and secure," but warned of the potential consequences of the state's scheduled admissions policy:

> What this quota policy means for the defendants is obvious. Over the preceding years, the number of convicted felons in Harris County facilities awaiting transfer to the TDC fluctuated regularly between 100 and 200. By the end of September, 1988 [sic], that number was up to 512; by December 31, 1987, the number stood at 798. Even more alarming than the growth itself is the likelihood that it will continue at about the same rate for the foreseeable future. . . . Harris County is, in effect, operating an 800-bed facility for TDC, by March or April, they may be operating the equivalent of a 1,000 bed facility.

By September of 1988, the monitors' dire forecast was realized. In their fourth report, issued on September 12, 1988, the monitors found that the jails' population increased from 4576 in

January of 1988 to 5650 in July of 1988, or thirty percent over design capacity. The monitors concluded that the jails were dangerously overcrowded:

> All systems are impossibly stressed, including food service, programming, elevators, recreation, classification, maintenance, visiting, supplies of clothing and bedding, security, medical care, and mental health services. So far these stressed systems have not broken down completely under the population pressures, but the Monitors believe that there is no elasticity left in the institution and its service systems.

The monitors further concluded that the appropriate capacities of the central jail at 1301 Franklin and the detention center in Humble were 3330 and 770 respectively, or 95% of design capacity. They recommended that the *Alberti* court direct the county and state to immediately reduce the jails' population to 120% of design capacity (4200 at the central jail and 970 in the detention center) and also set future population caps at 110% of design capacity upon the completion of the renovation of the old central jail at 301 San Jacinto and 95% of design capacity upon the completion of the new facility at 701 San Jacinto.

On November 8, 1988, on the basis of the monitors' report, the *Alberti* court *sua sponte* directed the county sheriff to transport and deliver to the Texas Department of Corrections (later the Texas Department of Criminal Justice--Institutional Division) at least 290 ready-felons each week beginning December 5, 1988. The court reasoned that, under Texas law, "the TDC, not Sheriff Klevenhagen or the Harris County Commissioner's Court, is responsible for housing persons who have been convicted of felony offenses in the State criminal courts." In support of this conclusion, the court cited Tex.Penal Code §§ 12.32-12.34, Tex.Code Crim.Proc. Art. 42.09 § 2, and Tex.Rev.Civ.State. Art. 6166r (now Tex.Gov.. Code § 499.006). The state, however, refused to accept ready-felons

above the quota allocated to the county in its scheduled admissions policy, leaving the county unable to comply with the order.

By December of 1988, the population of ready-felons in the county's jails leaped to over 2100, representing more than a third of the jails' population. On December 12, 1988, the county moved the *Alberti* court to require the plaintiffs to join state officials as additional defendants, urging that it could not achieve constitutional compliance without the participation of the state. The *Alberti* court denied the motion on January 12, 1989, but allowed the county to file a third-party complaint against the state. In the third-party complaint, the county prayed that the court enjoin the state to immediately remove all ready-felons from its jails, the county sought no monetary damages.

The state moved to dismiss the county's third-party complaint and, alternatively, for the joinder of all Texas counties and all ready-felons backlogged in Texas county jails. The state also moved to dismiss for lack of venue, to transfer venue, and to stay the *Alberti* proceedings pending an application to the judicial panel on multidistrict litigation. On May 12, 1989, the *Alberti* court denied the motion, reasoning that the state had a state law duty to "speedily" accept ready-felons and a federal constitutional duty not to impose cruel and unusual punishment on felons. *See* Tex.Rev.Civ.State. Art. 6166r (now Tex.Gov. Code § 499.006). If the state violated the latter constitutional duty, continued the court, then *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984), would not bar an order compelling compliance with constitutional standards. The court also denied the venue arguments, concluded that *Ruiz* was no bar to the third-party complaint, refused to abstain, and found the joinder of all other Texas counties unnecessary.

C. *The In re Clements bifurcation.*

On May 30, 1989, the plaintiffs moved the *Alberti* court to transfer to the *Ruiz* court their pending motions for a population cap on the county's jails and the county's motion for an order directing the state to remove ready-felons from its jails. The state joined the request that the third-party complaint be transferred to the *Ruiz* court.

Meanwhile, on June 26, 1989, the state moved the *Alberti* court to reconsider its May 12 order in light of a recently enacted statute, H.B. 2335, Tex.Gen. & Special Law 1989, Reg.Sess., Ch. 785, effective September 1, 1989. H.B. 2335 made a number of changes in the state's criminal justice system. Most relevant to this appeal, H.B. 2335 created the Texas Board of Criminal Justice as a replacement for the Texas Department of Criminal Justice, deleted the word "speedy" from Tex.Gov.Code § 409.006, and authorized the adoption of the scheduled admissions policy. Alternatively, the state moved the *Alberti* court to transfer the third-party complaint to the *Ruiz* court; the state objected, however, to the transfer of the plaintiffs' pending motions.

The *Alberti* court denied both the requests for transfer and the motion to reconsider on July 10, 1989. The court reasoned that the transfer was not required by this court's *en banc* decision in *Gillespie v. Crawford*, 858 F.2d 1101 (5th Cir. 1988), nor would it advance the purposes of *Gillespie*. As to the adoption of H.B. 2335, the court stated:

> [t]he fact that Third-Party Defendants may no longer have a state-law duty to 'speedily' accept convicted felons contrary to their admissions allocation formula does *not* abate their federal Constitutional duties toward these felons. . . . Third-Party Defendants' federal Constitutional duty to not impose cruel and unusual punishment

> upon convicted felons remains, regardless of the actual location of the felons' confinement.

The plaintiffs and the state then petitioned for a writ of mandamus from this court. We granted the writ in part on August 11, 1989, transferring to the *Ruiz* court

> so much of the *relief* portion of the third-party complaint as seeks an injunction ordering our individual petitioners (in their official capacities) to receive or take prisoners into TDC confinement or to otherwise take action in the operation or management of TDC-operated confinement facilities.

In re Clements, 881 F.2d 145 (5th Cir. 1989).

D. *The bench trial.*

The population of ready-felons in the county's jails continued to escalate, and by March of 1989, the jails' total population exceeded 7200, forcing 2700 prisoners to sleep on the floors each night. As stated by the monitors, "[t]o put this into some perspective, Harris County now has more prisoners sleeping on the floors of its detention facilities than the total number of convicted offenders incarcerated in each of fourteen states." In light of the increase in total population, the monitors revised their recommendations in a report issued on April 11, 1989. They suggested that the *Alberti* court direct the county and state to reduce the jails' population to 7000 (6000 in the central jail and 1000 in the detention center) within 30 days, 6400 (5500 in the central jail and 900 in the detention center) within 90 days, 5800 (4990 in the central jail and 810 in the detention center) within 180 days, and 5200 (4390 in the central jail and 810 in the detention center) within 270 days. They further suggested that the *Alberti* court set a final population cap of 8732, equal to design capacity, upon completion of the new facility at 701 San Jacinto. In a report issued the following

month, on June 1, 1989, the monitors concluded that "living conditions for inmates . . . have become intolerable, shocking to the conscience and unequivocally unconstitutional."

The *Alberti* court held a "merits-liability" bench trial August 14 through 18, 1989. By the time of the trial, the total population in the county's jails stood at 8086, or 188% of design capacity, with ready-felons, then a population of 3420, representing 45% of the total population. A parade of witnesses testified to the ill effects of the overcrowding. The lead special master, J. Michael Keating, described "much attenuated protection" because of inadequate staff, inadequate ventilation and food service, supply shortages, precarious fire safety, and a medical care system on the verge of collapse. The captain of the central jail, Don McWilliams, concurred with Keating's assessment and, in addition, testified to "a spectacular increase in the incidence of disciplinary infraction."

The *Alberti* court held an additional hearing on the plaintiffs' requests for supplemental relief September 12 through 15, 1989. At the hearing, the court expressed its concern that the county's joinder of the state as a third-party defendant could suffer jurisdictional defects under *Pennhurst*. Upon the court's suggestion, the plaintiffs sought leave to file a supplemental complaint against the state on September 15, 1989.

The *Alberti* court issued its findings of fact and conclusions of law on September 25, 1989. The court opened its opinion by granting the plaintiffs' motion for leave to file the supplemental complaint. It found that the conditions in the jails were "cruel and unusual," citing extreme overcrowding as "the primary cause" of the constitutional violation. More specifically, the court found that 2800-2900 prisoners slept on the floor each night, forming a "human carpet" in some cellblocks, that the staff was inadequate to assure the safety of all prisoners, that there had been a great increase in disciplinary violations, that there were problems with plumbing and ventilation, that fire safety was "severely compromised," that

supplies and food service were inadequate, that medical care conditions reflected "conscious indifference towards the inmates' serious medical needs," and that county judges gave greater weight to pre-trial release recommendations than state judges.

The *Alberti* court concluded that the county was liable for the violation because, under Texas law, its sheriff and commissioners court were keepers of the jails. Tex.Local Govt. Code §§ 351.001-351.015 and 351.041-351.042. The court further found the state jointly liable because, under Texas law, it had the "primary responsibility" for convicted felons. Tex. Rev. Civ.Stat. Art. 4413(401) § 1.02. In the opinion, the *Alberti* court also transferred the third-party complaint and the supplemental complaint to the *Ruiz* court.

On October 11, 1989, the county moved to supplement or amend the September 25, 1989, findings of fact and conclusions of law and, alternatively, for a new trial. The *Alberti* court denied the motion on October 23, 1989. Shortly thereafter, both the county and the state filed protective notices of appeal. This court dismissed the appeals as premature on January 3, 1990.

E. *Subsequent remedial orders.*

After the transfer to the *Ruiz* court in the September 25 findings of fact and conclusions of law, the *Alberti* and *Ruiz* courts combined to hold joint hearings and issue joint orders on the remedial aspects of the *Alberti* case.[1] The parties at first

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[1] In an opinion issued shortly after the transfer, Judge Justice described the transfer as partial. Citing *In re Clements*, he stated that:

> It is apparent from the Court of Appeals' opinion that the *Alberti* court retains the power to order certain forms of relief against the State Defendants, so long as that relief does not require those defendants to "receive or take

(Footnote continued on next page)

engaged in settlement negotiations, but when the prospects for settlement dimmed, the combined courts ordered the county and state to submit proposed remedial plans by January 17, 1990. After the parties submitted their proposed plans, the combined courts held joint hearings on February 27 and 28, 1990.

On March 15, 1990, the combined courts entered a joint remedial order, directing the county and state to reduce the jails' population to 6700 upon entry of the order and to 6100 by August 31, 1990. The order contained a number of additional provisions, addressing among other matters a reduction in the population of ready-felons, the development of alternatives to incarceration, and releases of prisoners in the event of non-compliance.

After the parties moved the combined courts to alter or amend the order, the courts vacated the March 15 order and replaced it with a second order, *nunc pro tunc*, on April 5, 1990. The April 5 order directed the county and state to reduce the jails' population to 6700 upon entry of the order, to 6400 by May 15, 1990, and to 6100 by August 31, 1990. The order specifically required the state to remove 9130 ready-felons between February 1 and August 31, 1990. The state complied with this aspect of the order. Like the March 15 order, the April 5 order provided for the development of alternatives to incarceration and, in addition, directed releases of prisoners in the event of non-compliance. The combined courts denied the parties' motions to alter or amend the order, or for a new trial on April 25, 1990.

The April 5 order proved effective in reducing the jails' population. By August 13, 1990, the total population stood at

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Footnote continued from previous page)

prisoners into TDC" or to take other action "in the operation or management of TDC-operated facilities."

Judge Justice proceeded to direct his special master in *Ruiz* to confer with the *Alberti* special master.

6097, or 130% of design capacity, and the population of ready-felons had dropped to 1069. The renovation of the old central jail at 301 San Jacinto, completed in December of 1989, had increased the combined design capacities of the county's jails to 4698.

Upon the expiration of the April 5 order, the combined courts issued a third joint remedial order on September 7, 1990. In the order, the courts purported "to bridge the next 12 months" until the completion of the new facility at 701 San Jacinto, designed to house an additional 4000 prisoners. The order first required the county to occupy the new facility by September 1, 1991, and provided for "a substantial daily fine for each day beyond September 1, 1991 they failed to occupy the 701 Building." The order further directed the county and state to reduce the jails' population to 6100 upon entry of the order and to 6000 by December 31, 1990, capping the ready-felon population at 1350 and the remaining population at 4751, to be reduced to 4650 by December 31, 1990. Again, like the earlier orders, the September 7 order provided for the development of alternatives to incarceration and directed releases of prisoners in the event of non-compliance.

Pursuant to the September 7 order, the *Alberti* court issued four orders directing the release of 254 pretrial and convicted misdemeanants on September 14, 17, and 18, 1990. Both the county and the state appealed this order. The state obtained a partial stay of the order from this court on September 21, 1990. We later withdrew the stay on the understanding that, first, the combined courts would not release felons without sufficient notice for application by the parties for further stay and, second, that the parties would work together "to obtain a process that will protect the public safety and the integrity of the criminal justice system as well as the rights of prisoners."

Prior to the releases, the county and state had moved the combined courts to alter or amend the September 7 order, or alternatively, for a new trial. The *Alberti* court set a hearing for

October 22, 1990, and ordered the defendants to submit new proposed remedial plans. The court specifically announced that the alternatives to be considered at the hearing would include "(1) temporary housing and the expense and time necessary for the construction thereof and (2) the utilization of facilities of nearby counties which may have available jail space." After the hearing, the court concluded that the county and state had "not yet developed a feasible strategy for addressing the overcrowding problem in Harris County detention facilities that precludes the need for further releases of inmates, although elements of a possible solution surfaced." The court accordingly directed the defendants to meet with the monitors in the *Alberti* and *Ruiz* cases and "to jointly develop an acceptable plan for dealing with the short-term population crisis in Harris County facilities."

On November 19, 1990, the *Alberti* court stayed the releases authorized in the September 7 order, giving the county and state sixty days to implement alternative programs designed to bring the jails' population within the caps set in the September 7 order. The November 19 order also contained a fallback provision; it stated that if the required caps were not met within sixty days, the court would require "the defendants, or either of them . . . to contract for the use of private jail cells or empty county jail cells around the State to house excess prisoners."

On February 7, 1991, upon finding that the jails' population still exceeded the caps set in the September 7 order, the *Alberti* court issued a fourth remedial order. Evidencing a growing impatience, the court refused the state's request to further delay implementation of the population caps established in the earlier orders. Instead, the court implemented an alternative remedy pending the opening of a boot camp in April of 1991 and the new facility at 701 San Jacinto in September of 1991. The order first directs the county and state to reduce the jails' population to 6300 within 45 days. County prisoners, including felons not ready for transfer, are not to exceed 4725

(75% of capacity), and ready-felons are not to exceed 1575 (25% of capacity). If necessary to meet the population caps, the order directs the county sheriff to transfer ready-felons to facilities in other counties. The state is required to deposit $750,000 with the *Alberti* court's registry by March 20, 1991. The order authorizes the county to pay up to $40 per day for the housing of each transferred prisoner, the expenditures are to be reimbursed by the state's deposit to the extent that ready-felons exceed the 1575 cap.

Unlike the previous remedial orders, the February 7 order was not a product of the combined courts. Instead, Judge Justice wrote separately "to clarify my relationship to the relief set forth." Although he conceded that the order was within the scope of *Alberti*, he suggested that the requirement that the state deposit $750,000 "seemingly falls within the purview of *Ruiz*" and stated that he "would abstain" from deciding whether, under Texas law, the state was obliged to pay costs incurred by the county in housing ready-felons in other counties' facilities.

Both the county and state filed motions to modify the February 7 *Alberti* order. The state also filed a motion to vacate the order and a notice of appeal. While the motions to vacate were pending, the state petitioned for a writ of mandamus from this court, asking that we vacate the portion of the February 7 order requiring the state to deposit $750,000 and, in addition, either enforce or modify our previous decision in *In re Clements*. Alternatively, the state requested a stay of the portion of the order requiring the $750,000 deposit, a writ of prohibition, summary reversal, or certification to the Texas Supreme Court.

On March 15, 1991, the *Alberti* court slightly modified the order and denied the motions to vacate or stay the order. The county and state then filed new notices of appeal. On March 21, 1991, this court similarly denied the state's request for a stay of the portion of the order requiring a $750,000 deposit. The Supreme Court temporarily stayed the provision

the same day, but on April 1, 1991, withdrew the stay. The state and county now appeal the September 25 findings of fact and conclusions of law and each of the subsequent remedial order.

II.

The county and the state initially offered little resistance to the assertion that excessive overcrowding in the county's jails renders the conditions of confinement for the plaintiff class unconstitutional. While this appeal was pending, however, the Supreme Court held in *Wilson v. Seiter*, ___ U.S. ___, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991), that the Eighth Amendment "mandate[s] inquiry into a prison official's state of mind when it is claimed that the official has inflicted cruel and unusual punishment." In supplemental briefs to this court, each defendant argued that only the other acted with the requisite intent.

Even after *Seiter*, then, the heart of the appeal remains the relative responsibilities of the state and county. The county believes that the state should shoulder full responsibility, as the overcrowded conditions have resulted largely from the huge backlog of ready-felons. The state, on the other hand, contends that state law places full responsibility for the jails on the county. In formulating its remedial orders, the *Alberti* court faced the difficult task of remedying the constitutional violation without intruding on the state's right, as a sovereign, "to decide who will be held liable for civil rights violations that occur in the course of carrying out [state powers]." *Bush v. Viterna*, 795 F.2d 1203, 1209 (5th Cir. 1986). We believe the balance was well struck by the *Alberti* court. However, we vacate and remand the liability findings against the state and the county to allow the *Alberti* court to consider the effect of *Seiter*. Before addressing the liability and remedial issues, we turn to two jurisdictional issues.

A. *Jurisdictional issues*:

1. *The expired remedial orders.*

[1] The first three remedials orders, issued on March 15, April 5, and September 7, are now expired. The county argues that the orders are still appealable, however, because the issues presented by the orders are "capable of repetition, yet evading review." *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). We took this position in an order denying the state's motion to dismiss the county's appeal of the first remedial order as moot but noted that, upon further consideration, the oral argument panel might find the appeal moot. The plaintiffs contend that the first two remedial orders are moot even under *Bell* because the latest order, issued on February 7, 1991, expressly "superseded" them. However, we continue to find the county's characterization convincing. *See National Wildlife Federation v. Costle*, 629 F.2d 118, 123-24 n. 19 (D.C.Cir. 1980).

2. *The medical care findings.*

[2, 3] In its September 25 findings of fact and conclusions of law, the *Alberti* court suggested that the medical conditions in the county's jails constituted an independent constitutional violation.[2] However, none of the remedial orders specifically address medical care. The plaintiffs contend that the county's challenge to the medical care findings is thus premature. We agree with the plaintiffs, but not fully with their characterization of the relevant jurisdictional defect. There has been no final judgment in the *Alberti* case, and the state and county are thus appealing the remedial orders under 28 U.S.C. § 1292(a)(1). As medical care has not yet been implicated in a

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2 The *Alberti* court found that the poor level of medical care reflected "conscious indifference towards the inmates' serious medical needs." Under *Seiter*, 111 S.Ct. at 2321, and *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), this finding alone establishes an Eighth Amendment violation.

remedial order, the related findings are outside the § 1292(a)(1) exception to the final judgment rule.

B. *Liability issues*:

1. *The relative obligations of the state and the county.*

[4] The starting point in evaluating the relative obligations of the state and the county is *Bush v. Viterna*, 795 F.2d 1203 (5th Cir. 1986). In *Bush*, a class of county inmates brought an action under § 1983 to compel a newly created state commission, the Texas Commission of Jail Standards, to discharge its state law duties. The authorizing statute required TCJS to establish minimum standards for county jails and to review reports of noncompliance. Additionally, the statute gave TCJS discretionary enforcement powers. The plaintiffs urged a "supervisory liability" theory, suggesting that TCJS legally caused constitutional wrongs that it failed to prevent or correct. In rejecting the plaintiffs' theory, we reasoned that Texas law identifies county sheriffs and commissioners courts, not TCJS, as keepers of the county jails. *Id.* at 1206. *Bush* thus concluded as follows:

> [A]ccepting for now the concept that the breach of a state-imposed duty can cause a constitutional tort, we hold that the necessary causal relationship is absent when a state duty to regulate, monitor, inspect, or advise is not accompanied by an obligation to extirpate constitutionally substandard conditions or activities that may be encountered.

Id. at 1208.

Particularly relevant to this appeal is the final section of *Bush*, where we explained "the different roles that state and federal law inevitably play in the analysis of constitutional

torts." *Id.* at 1208. Whenever a plaintiff alleges a cause of action under § 1983, a federal court must ask three questions. First, is a federally secured right affected? In some cases, particularly procedural due process cases, the federal court must look to state law to answer related threshold questions, such as "whether the claimant in fact had a property right in whatever it was that was taken away from him," but the right itself is defined by federal standards. *Id.* at 1209. Second, was the alleged deprivation of the right accomplished by state action? Here again, some reference to state law is necessary, but "the definition of state action is ultimately a question of federal law." *Id.* Finally, who is the state actor responsible for the violation? Unlike the first two questions, the third question turns *exclusively* on state law. "The states have virtually complete freedom to decide who will be responsible for such tasks, and therewith to determine who will be held liable for civil rights violations that occur in the course of carrying them out. *Id.*

The hard question in this appeal is the third question, the issue of who is liable for the conditions in the county's jails. The county clearly has some responsibility for the conditions in its own jails. Texas law requires the county's commissioners court to provide "safe and suitable jails" and makes the county's sheriff "keeper of the county jail." Tex.Local Govt.Code §§ 351.001 and 351.041. The county does not deny these obligations; rather, it argues that the objectively cruel conditions in its jails have resulted solely from the state's backlogging of ready-felons. For reasons discussed more fully below, *Seiter* gives some new fuel to the county's argument.

By contrast, the state denies any responsibility for the conditions in the county's jails. The *Alberti* court twice rejected the state's contention that Texas law makes the county solely liable, first in an order denying the state's motion to dismiss the county's third-party complaint and again in its September 25 findings of fact and conclusions of law. The court distinguished *Bush* because "[i]n contrast to the Texas Commission of Jail Standards, Third-Party Defendants have a state and constitu-

tionally imposed duty to provide appropriate conditions of confinement for the approximately 3500 convicted felons currently incarcerated in the Harris County Jails." In support of this conclusion, the court cited *Stewart v. Winter*, 669 F.2d 328 (5th Cir. 1982), a remarkably similar case.

In *Stewart*, a class of inmates housed in Mississippi county jails brought an action against both county and state officials under § 1983 to challenge the conditions of the jails. The district court granted the state's motion to dismiss on the ground that the state had no authority over the county's jails. On appeal, however, this court held that the district court erred in dismissing the claims against the state. We reasoned as follows:

> Several of the named plaintiffs, and thousands of the putative class members, are state prisoners committed to the custody of the Mississippi Board of Corrections. The district court's holding would allow the defendant state officials to relegate their prisoners to "cruel and unusual punishment" so long as they have no power to change the conditions of confinement in county jails. We reject this theory. This court has consistently held that state officials cannot disclaim responsibility for cruel and unusual conditions of confinement of prisoners in their custody on the ground that it is beyond their power to effect the changes necessary to bring the conditions up to minimal standards. [citations omitted] Even if the district court were correct in deciding that the defendant state officials have no authority to make changes in county jails, the district court could have ordered the state officials to remove prisoners in their custody from any county jail found constitutionally inadequate, or, in the alternative, offered them the opportunity to assist the county in making the

> necessary changes in order to continue using the jail to incarcerate state prisoners.

Id. at 332.

Benjamin v. Malcolm, 803 F.2d 46 (2d Cir. 1986), and *Tate v. Frey*, 735 F.2d 986 (6th Cir. 1984), like *Stewart*, involved essentially identical situations. In *Benjamin*, after city inmates brought a § 1983 challenge to the conditions of New York City jails, the city moved to join the state of New York as a third-party defendant. The city contended that the overcrowding in its jails resulted from the state's failure to accept convicted felons as required by state statute:

> When a sentence of imprisonment is pronounced, or when the sentence consists of a fine and the court has directed that the defendant be imprisoned until it is satisfied, the defendant must forthwith be committed to the custody of the appropriate public servant and detained until the sentence is complied with.

N.Y. Criminal Procedure Law § 430.20. The district court granted the city's motion and directed the state to accept felons within 48 hours from the completion of transfer processing.

On appeal, the Second Circuit rejected the state's *Pennhurst* argument and affirmed the order joining the state. Its opinion echoes of *Stewart*:

> [P]risoners whom [the state] refuses promptly to accept into its prisons are not those of some other state, county, or planet, but its own prisoners who have been convicted by New York State courts of New York felonies. The State cannot therefore wash its hands of its *federal constitutional responsibility* for the detention conditions of such prisoners because they are

> temporarily housed in City facilities or because a New York statute requires the State to accept them "forthwith."

Id. at 51 (emphasis in original).

In *Tate*, after county inmates brought a § 1983 challenge to the conditions in Jefferson County jails, the county filed a third-party complaint against the state of Kentucky. The state had adopted a "controlled intake policy" pursuant to a consent decree in litigation involving its own prisons, and in accordance with the policy, refused to timely accept felons in the county's jails awaiting transfer to state prisons. After finding that the overcrowded conditions in the county's jails were caused in part by the state's policy, the district court issued an order directing state officials to reduce the number of felons in the county's jails by transferring felons to a state prison within thirty days of sentencing.

On appeal, the state argued that the district court erred in allowing the third-party complaint. The Sixth Circuit affirmed, finding a "substantive basis" for the claim in a state statute:

> When an indeterminate term [1 year or more] of imprisonment is imposed, the court shall commit the defendant to the custody of the bureau of corrections for the term of his sentence and until released in accordance with the law.

Kentucky Revised Statute § 532.100. An accompanying commentary states that § 532.100 "assures that felony offenders, once convicted and sentenced to imprisonment, *shall* be delivered to the Department of Corrections, with the specific place of incarceration to be left to the Department." As the case involved a preliminary injunction, the Sixth Circuit reviewed the district court only for abuse of discretion. But the Sixth Circuit rejected the state's *Pennhurst* argument, affirming the

district court's finding that the state was partly responsible for the unconstitutional conditions in the county's jails.

The state's attempt to distinguish *Benjamin* is without merit. The state argues that the result in *Benjamin* turned partly on the fact that New York's refusal to accept convicted felons made it "impossible for the city to comply with the district court's judgment against it in the plaintiffs' favor." The state then cites *Badgley v. Vareles*, 729 F.2d 894, 901 (2d Cir. 1984) for the proposition that, if complete relief can be obtained from the county, then there is no right to an order against the state. The real difference between *Benjamin* and *Badgley*, however, was that in *Badgley* New York was not adjudicated a constitutional violator. *See Benjamin*, 803 F.2d at 52.

The state's reliance on *Bush* is thus misplaced unless the Texas scheme is significantly different from the schemes in Mississippi, New York, and Kentucky. In its September 25 findings of fact and conclusions of law, the *Alberti* court reasoned that the state was jointly liable for the unconstitutional conditions in the county's jails because, although the sheriff is the keeper of the jail, the state is responsible for the confinement of convicted felons under Tex.Pen.Code §§ 12.31-12.34 and Tex. Code Crim. Pro. Art. 42.09. Before the 1989 amendments, continued the court, the transfer of convicted felons was governed by the interplay between Tex. Code Crim. Pro. Art. 42.09 and Tex.Gov. Code § 499.006--§§ 1 and 4 of Art. 42.09 envisioned "at least a temporary stay at the jail when a felon does not appeal his conviction or when a felon appeals his conviction but his sentence is for a term of ten years or less," while § 499.006 provided for a "safe and speedy" transfer to a state facility.[3]

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[3] The relevant Texas provisions are as follows:

1. *Tex.Pen.Code Ch. 12 (punishments) §§ 12.31-12.34 (ordinary felony punishments):*

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These provisions state that individuals adjudged guilty of a capital felony, first-degree felony, second-degree felony, or third-degree felony "shall be punished by confinement in the Texas Department of Corrections."

2. *Tex.Rev.Civ.Stat. Art. 4413(401) (Department of Criminal Justice) § 1.02 (responsibilities):*

This provision states that the Department of Criminal Justice has "primary responsibility for (1) the confinement, supervision, and rehabilitation of felons."

3. *Tex.Code Crim.Pro. Ch 42 (judgment and sentence) Art. 42.09 (commencement of sentence, delivery to place of confinement):*

Section 1 states that, except as otherwise provided, the defendant "shall be delivered to jail or to the Department of Corrections when his sentence to imprisonment is announced." If the defendant is convicted of a felony and sentenced more than ten years, and he gives notice of appeal, § 3 states that he "shall be transferred to the Department of Corrections on a commitment pending a mandate from the court of appeals or the Court of Criminal Appeals." If on the other hand, he is convicted of a felony and sentenced less than ten years, and he gives notice of appeal, § 4 states that he shall only be transferred to the Department of Corrections upon his request. *See Ex parte Rodriguez*, 597 S.W.2d 771 (Tex.Cr.App. 1980). None of the provisions specify the proper course *absent* an appeal. Finally, § 8 states that the Department of Corrections "shall not take a defendant into custody" until it receives specified documents from the county.

4. *Tex.Code Crim.Pro. Ch. 104 (certain expenses paid by state and county) Art. 104.002 (expenses for prisoners):*

This provision states that "a county is liable for all expenses incurred in the safekeeping of prisoners confined in the county jail or kept under guard by the county." It also provides for inter-county (but not state-county) reimbursements.

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Although the 1989 amendments deleted the requirement of a "speedy" transfer and authorized the adoption of the scheduled admissions policy, the *Alberti* court concluded that the amendments did not relieve the state of its responsibility for the confinement of convicted felons:

> The State of Texas is free to allocate the admissions of felons into the penitentiary in virtually any manner it chooses so long as the allocation does not result in the cruel and unusual punishment of inmates. However, when it becomes clear that convicted felons are being confined in conditions that violate the Eighth Amendment, the relevant inquiry becomes who

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5. *Tex.Gov.Code Ch. 494 (Texas Department of Corrections--contracts)*:

Adopted as part of the 1989 amendments, this chapter authorizes the Board of Corrections to contract with a private vendor *or* a *county* commissioners court for jail space. *See* § 494.001. A private vendor or county under contract with the Board has no authority to compute parole or release dates, award good time, approve furloughs, or reclassify inmates. *See* § 494.004.

6. *Tex.Gov.Code Ch. 499 (miscellaneous matters) Art. 499.006 (transportation of inmates):*

Before its 1989 amendment, this provision stated that the director of the Board of Corrections "shall adopt rules to provide for the safe and speedy transfer of inmates from the counties in which inmates are sentenced to the department." Now, the provision states that the director "shall make suitable provision and regulations for the safe transportation or prisoners from counties where sentenced to the State penitentiary."

7. *Tex.Local Gov.Code Ch. 351 (jails and law enforcement) § 351.041 (sheriff):*

This provision makes the sheriff of each county "the keeper of the county jail."

> is responsible for those inmates. Fortunately, H.B. 2335 [the 1989 amendatory act] provides a clear answer to this inquiry. Section 1.02(a)(1) provides, "The department [TDCJ, formerly TDC] is the state agency with *primary* responsibility for . . . the confinement, supervision, and rehabilitation of felons." Thus, the fact that the State of Texas has "virtually complete freedom to decide who will be responsible" for the confinement of felons provides no shield from liability for the State Defendants in this case because state law clearly places the primary responsibility for the confinement of felons upon them. *See Bush v. Viterna*, 795 F.2d 1203, 1209 (5th Cir. 1986).

The *Alberti* court's reasoning is consistent with that of the only state court to have addressed the issue. After the 1989 amendments, Nueces County and Harris County both filed suit in Travis County, contending that the state still had the responsibility either to promptly remove ready-felons or to reimburse the counties for the costs of their housing. In both cases, the state court ruled for the county on the merits; one case is now on appeal, and the other still before the district court on damages issues. *County of Nueces v. Texas Board of Corrections*, No. 452,071 (Dist.Ct. of Travis County, 126th Judicial Dist. of Texas 1991); *Harris County v. State of Texas*, No. 465,468 (Dist.Ct. of Travis County, 126th Judicial Dist. of Texas, pending).[4] Since our task, as set forth in *Bush*, is to de-

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[4] The reasoning of the state court is best laid out in a letter from the judge to the parties dated May 31, 1990. The court reasoned that the statutory provisions placing responsibility for felons with the state were quite clear. Tex.Pen.Code §§ 12.31-12.34; Tex.Crim.Pro.Code Art. 42.09; Tex.Gov.Code § 499.006. On the other hand, the provision cited by the state, the scheduled admissions policy, was ambiguous. "It neither expressly relieves the state of the duty to take and confine felons nor expressly

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cide who is liable for the violation under *state* law, we find it appropriate to defer to the state courts on the issue.[5]

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places that duty on the counties." The court was also influenced by the awkward effects that in its opinion , the state's interpretation would have:

> 1. H.B. 2335 which places "primary responsibility" for the confinement, supervision and rehabilitation of felons on the Texas Department of Criminal Justice will be rendered meaningless. [citations omitted]
> 2. The statutes cited above which unambiguously require that TDC confine felons will, in effect, be repealed.
> 3. The portions of the court orders which sentence felons to TDC will be meaningless.
> 4. New duties will be placed on the counties which they have never had before possibly in violation of Article 5, § 18(b) of the Texas Constitution. Conversely, the State will be relieved of duties clearly placed on it by statute.
> 5. The taxpayers of the affected counties will have to shoulder a tremendous financial burden which under the unambiguous statutes should be borne by the whole state.

The court also noted that a bill relieving the state of financial responsibility for felons left in county jails was introduced, but failed to pass.

As the county points out, the state is a party to both *County of Nueces* and *Harris County*.

[5] We find no merit in several related arguments urged by the state. For example, the state argues that, under the supremacy clause, "any such state law duty to accept inmates more speedily (if it ever existed) must give way to orders entered by the federal district court in *Ruiz*." The *Alberti* obligation arises from the Eighth Amendment. The consent decree in *Ruiz* must give way to its demands. At any rate, the *Alberti* court specifically found that the state "could have complied with the requirements of the *Ruiz* decree without refusing to accept prisoners."

The state also makes several intent arguments. First, the state points out that "the Very Legislature that passed § 1.02

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2. *The deliberate indifference requirement.*

[5] Our conclusion that state law imposes responsibilities on both the state and the county does not end our inquiry. At the time of the liability hearings before the *Alberti* court, the focus of the parties and the court was on the objective conditions of confinement in the county's jails. *See Rhodes v. Chapman*, 452 U.S. 337, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981); *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978). This circuit had earlier held that "unlike 'conduct that does not purport to be punishment at all' as was involved in *Gamble* and *Whitley*, the Court has not made intent an element of a cause of action alleging unconstitutional conditions of confinement." *Gillespie v. Crawford*, 833 F.2d 47, 50 (5th Cir. 1987) (quoting *Whitley v. Albers*, 475 U.S. 312, 319, 106 S.Ct. 1078, 1084, 89 L.Ed.2d 251 (1986)), vacated on other grounds, 858 F.2d 1101 (5th Cir. 1988). Both the county and the state expressly conceded that excessive overcrowding rendered the conditions of confinement in the county's jails unconstitutional, and each attempted to persuade the court that the other should shoulder full responsibility.

While this appeal was pending, however, the Supreme Court held that prison conditions rise to the level of cruel and unusual punishment only when they are a product of state indifference. In *Wilson v. Seiter*, ___ U.S. ___, ___, 111 S.Ct. 2321, 2325, 115 L.Ed.2d 271 (1991), the Court identified the

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[stating that the state has "primary responsibility" for felons] failed to enact any appropriations that would enable State Defendants to assume responsibility for the care or treatment of convicted felons in local jails." This argument fails to explain the contemporaneous passage of Tex.Gov.Code § 494.001, authorizing the state to contract for jail space with private vendors or counties. Second, the state contends that the Legislature rejected three bills to compensate states for holding ready-felons. But, as the county points out, these "proposed" bills never even reached the floor for a vote.

source of this subjective requirement as "the Eighth Amendment itself, which bans only cruel and unusual *punishment*. If the pain inflicted is not formally meted out as *punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify." In prison conditions cases, like *Alberti*, the requisite intent is "deliberate indifference" as articulated by the Court in *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). *Id.* ___ U.S. at ___, 111 S.Ct. at 2326.[6]

The deliberate indifference requirement of *Seiter* and *Estelle* is not wholly separate from the objective requirement of *Rhodes*. In *Seiter*, the Court explained that the "long duration of a cruel prison condition may make it easier to *establish* knowledge and hence some form of intent." *Id.* at ___, 111 S.Ct. at 2325. Several lower courts, cited in *Seiter*, have found deliberate indifference where prison officials were aware of objectively cruel conditions but failed to remedy them. *See Cortes-Quinones v. Jiminez-Nettleship*, 842 F.2d 556, 560 (1st Cir. 1988); *Morgan v. District of Columbia*, 824 F.2d 1049, 1063 (D.C. Cir. 1987). In *Alberti*, there is little doubt that both the county and the state knew that the conditions of confinement in the county's jails deprived the inmates of basic needs. The county's jails had been under the continuing jurisdiction of the *Alberti* court since 1975, the monitors' reports became increasingly strident after mid-1988, and both the county and the state expressly admitted that he conditions of

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6 In *Seiter*, the Supreme Court stated that, in emergency situations, the requisite intent rises to "acting `maliciously and sadistically for the purpose of causing harm.'" *Seiter*, ___ U.S. at ___, 111 S.Ct. at 2321. The state argues that we should apply this higher standard because of a purported clash between the state's responsibility to ready-felons in the county's jails and its responsibilities under the *Ruiz* decree. We think it clear, however, that the Court was concerned with short-term emergencies where prison officials must act "in haste, [and] under pressure." *Id.* (quoting *Whitley v. Albers*, 475 U.S. 312, 320, 106 S.Ct. 1078, 1084, 89 L.E.d2d 251 (1986).

confinement were objectively unconstitutional during the liability hearings.

In deciding whether the county and the state were deliberately indifferent to the needs of the plaintiffs, however, we must also consider any relevant constraints. As Justice Scalia explained, "whether [conduct] can be characterized as 'wanton' depends upon the constraints facing the official." *Seiter*, ___ U.S. at ___, 111 S.Ct. at 2326. *LaFaut v. Smith*, 834 F.2d 389 (4th Cir. 1987), written by former Justice Powell and cited extensively in *Seiter*, is instructive. In *LaFaut*, a paraplegic prisoner alleged that prison officials had denied him adequate toilet facilities and necessary physical therapy in violation of the Eighth Amendment. In reviewing the district court's findings, Justice Powell noted that, although LaFaut specifically informed prison officials that his toilet facilities were inadequate, they made no attempt to modify the facilities for two months and, when their initial attempt failed, waited another month before transferring LaFaut to a cell with adequate facilities. Similarly, although LaFaut repeatedly requested physical therapy and official medical reports confirmed the need for therapy, he waited two months for minimal motion therapy and eight months for a transfer to an institution with adequate therapy.

Justice Powell concluded that, because there was no reason for the delays, the prison officials had been deliberately indifferent to LaFaut's needs:

> There is nothing in the record before us . . . to justify the inordinate delays in accommodating appellant's needs in light of the practicality and availability of various solutions. Prison officials should not ignore the basic needs of handicapped individuals or postpone addressing those needs out of mere convenience or apathy. As appellee Hambrick was the responsible official in charge of Butner, and she was fully advised both of the

> inhumane conditions of appellant's confinement and the failure to provide him with needed therapy we concluded that her neglect constituted "deliberate indifference" and therefore violated the Eighth Amendment.

Id. at 394.

The state contends that its actions were not deliberately indifferent but instead necessitated by the *Ruiz* decree and the over-crowding problems in its own prisons. However, the *Alberti* court specifically found that:

> State Defendants could have complied with the requirements of the *Ruiz* decree without refusing to accept prisoners. Federal authority did not require them to refuse to accept inmates from county jails. The most obvious alternative would have been to timely build new prison facilities. The Court described other alternatives [such as contracts with other suitable facilities or early releases as authorized by the Texas Prison Management Act, Tex.Rev.Stat.Ann. Art. 6184*o*] in its May 12, 1989 Memorandum and Order.

There is no doubt that the relevant state officials knew that ready-felons were being backlogged despite the objectively cruel conditions in the county's jails. Yet the state chose to leave them in the jails. This is strong if not compelling evidence of deliberate indifference to the plight of these ready-felons, and it is only accented by the alternatives available to the state. As found by the *Alberti* monitors, the state's management of ready-felons in Harris County "in essence . . . ignore[d] those state prisoners. . . . " Significantly, the state could have housed prisoners in a variety of ways. Even housing them under conditions of a military bootcamp would not touch the Eighth Amendment. Indeed, a tent city would be far superior to the conditions in the county's jails. The state cannot turn away from

the use of such common sense solutions by pointing to the *Ruiz* decree. The district court explicitly found that the decree was no impediment; and in any event, the *Ruiz* decree could not legally impede such plain responses, at least to the extent its constraints were not themselves required by the Constitution.

Nor does this record offer substantial evidence that the state's actions were constrained by legislative refusal to fund the only means by which the state could have relieved the county. Before *Seiter*, it was well established in this circuit that "inadequate funding will not excuse the perpetuation of unconstitutional conditions of confinement." *Smith v. Sullivan*, 611 F.2d 1039, 1044 (5th Cir. 1980); *see also Gates v. Collier*, 501 F.2d 1291, 1319-20 (5th Cir. 1974). Other circuits have found deliberate indifference over allegations of inadequate funding. *See Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir. 1986); *Ancata v. Prison Health Services, Inc.*, 769 F.2d 700, 705 (11th Cir. 1985); *Wellman v. Faulkner*, 715 F.2d 269, 274 (7th Cir. 1983). The issue is assured currency by the intent requirement of *Seiter* and that opinion's leave of it. *See Seiter*, ___ U.S. at ___, 111 S.Ct. at 2326. We need not address the issue here in the absence of findings pointing the finger at the legislature. In short, however, this record leaves us skeptical of the assertion that a recalcitrant legislature was the culprit.

We would, by necessity, affirm a finding that the state was deliberately indifferent. Indeed, such a finding on this record would be virtually unassailable. There is understandably no such finding, however, because deliberate indifference was not an issue when the *Alberti* court ruled. As strong as the case is, we are reluctant to conclude that a finding of deliberate indifference is compelled as a matter of law. Factfinding is a province of the district court. We therefore remand for the appropriate findings and leave to the district court the decision to take any further evidence.

[6] The county also argues that its actions were not deliberately indifferent after *Seiter*. Again, there is no finding,

but here the record offers some evidence of arguably formidable constraints. The *Alberti* court noted in its September 25 findings of fact and conclusions of law that, until the state began refusing ready-felons, "it appeared that a spirit of cooperation between Plaintiffs and County Defendants would eventually led to full compliance with all Court orders with a minimum of direct judicial intervention." In June of 1987, the county's jails were only five percent over capacity, and the number of ready-felons in the county's jails had regularly fluctuated between 100 and 200 for several years. Upon the state's decision to backlog ready-felons, their numbers quickly jumped to 512 in September of 1987, 798 in December of 1987, 2100 in December of 1988, and 3420, or 45% of the total population of 8086, by the time of the liability hearing in August of 1989.

In light of the increase in the population of ready-felons over such a short period of time, we cannot conclude from the record as it now stands that the county has deliberately ignored the needs of its inmates or that its delay in accommodating the over-crowding has been "inordinate." *LaFaut*, 834 F.2d at 394. By contrast, any increase in the population of state prisoners, including ready-felons, was expressly contemplated by the state. The 95% "crowding stipulation" in *Ruiz*, signed by the state, provides that:

> The parties further acknowledge that certain conditions and eventualities are within the contemplation of the parties. These include the possibility that TDC may experience a substantial increase or decrease in its population.
> . . .

See Ruiz v. Lynaugh, 811 F.2d 856 (5th Cir. 1987).

While the huge jump in the population of ready-felons might weigh against a finding of deliberate indifference, other facts could weigh in favor of such a finding. For example, the *Alberti* court found problems with the jails' plumbing,

ventilation, fire safety, supplies, food service, and medical care. The *Alberti* court also found that the constitutional capacity of the county's jails equalled their designed capacity and that "[e]ven if all TDC-ready prisoners were removed from the jail, the population would still exceed design capacity by approximately 400 inmates." The 1975 consent decree could also factor into the county's liability. We thus remand for the appropriate finding and, again, leave to the *Alberti* court whether it will conduct further hearings or consider additional evidence.

[7] Although we do not decide the liability question, one remaining issue is relevant to the remand. The county argues that the *Alberti* court erred in equating the constitutional capacity of its jails with their design capacity. But, in its September 25 findings of facts and conclusions of law, the court expressly recognized its obligation to consider the "totality of the conditions." And its findings contemplate a number of factors in addition to design capacity--the fact that thousands of inmates were sleeping on the floors, the physical design of the cellblocks, the inability of the staff to control the inmates, the increase in disciplinary violations, plumbing problems, poor ventilation, the absence of a sprinkler system or a second means of egress in the event of a fire, supply shortages, insufficient food service, inadequate medical care, and the outbreak of a pneumococcal infection. In sum, then, the finding was not clearly erroneous.

C. *Remedial issues:*

[8] The state's attacks on the remedial orders are all jurisdictional. First, the state argues that the orders violate the Eleventh Amendment because they enforce state law against the state, citing *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. 900, 97 L.Ed.2d 67 (1984), *Bush v. Viterna*, 795 F.2d 1203 (5th Cir. 1986), and *Kelley v. Bd. of Educ. of Nashville and Davidson County*, 836 F.2d 986 (6th Cir. 1987). The state contends that the county is fully responsible for

the conditions in its jails and that any duty the state might have to promptly remove ready-felons arises only under state law. While we agree with the state's premise, we reject its assumption that its duties arise only under state law. As discussed above, in *Stewart*, 669 F.2d at 333, a case involving a challenge to overcrowded conditions in Mississippi county jails, this court found the state partially responsible for the unconstitutional conditions because "state officials cannot shed their constitutional obligations by putting state prisoners in county jails." *Accord Benjamin*, 803 F.2d at 46; *Tate*, 735 F.2d at 986. Although *Stewart* predated *Pennhurst*, both *Benjamin* and *Tate* rejected *Pennhurst* arguments in identical situations. As reasoned by the Second Circuit:

> This argument [*Pennhurst*] must be rejected, however, for the reason that the prisoners whom [the state] refuses promptly to accept into its prisons are not those of some other state, country, or planet, but its own prisoners who have been convicted by New York state courts of New York felonies. The State cannot therefore wash its hands of its *federal constitutional responsibility* for the detention conditions of such prisoners because they are temporarily housed in City facilities or because a New York statute requires the State to accept them "forthwith."

Benjamin, 803 F.2d at 51 (emphasis in original). In sum, because the state is responsible for ready-felons, *Pennhurst*, *Bush*, and *Kelley*, are distinguishable.[7]

[9] The state also urges that the orders violate the Eleventh Amendment because they exact monetary rather than

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[7] In *Kelley*, cited extensively by the state, Tennessee was not a present constitutional violator when the order against it was entered. *See Kelley*, 836 F.2d at 989-90, 993-94.

prospective relief. Like the *Pennhurst* argument, however, this contention mischaracterizes the orders--the plaintiffs established a federal constitutional violation, and the state is a responsible party. The required payments are thus "a necessary consequence of compliance in the future with a substantive federal question determination." *Edelman v. Jordan*, 415 U.S. 651, 668, 94 S.Ct. 1347, 1358, 39 L.Ed.2d 662 (1974); *see also Milliken v. Bradley*, 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977); *Williams v. Edwards*, 547 F.2d 1206, 1212-13 (5th Cir. 1977); *Jenkins v. Missouri*, 807 F.2d 657 (8th Cir. 1986), *rev'd in part on other grounds*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). *Kelley*, cited extensively by the state, is distinguishable--the order remedying the violation in *Kelley* ran only against the county, and the state was not a current constitutional violator, yet the county sought reimbursement from the state for the costs of the remedial order. *See Kelley*, 836 F.2d at 990-94.[8]

[10] Finally, the state argues that the *Alberti* court should have abstained from ordering it to pay for the housing of ready-felons in other county's jails pending the ultimate resolution of the state litigation, discussed above. *County of Nueces v. Texas Board of Corrections*, No. 452,071 (Dist. Ct. of Travis County, 126th Judicial Dist. of Texas 1991); *Harris County v. State of Texas*, No. 465,468 (Dist. Ct. of Travis County, 126th Judicial Dist. of Texas, pending). But none of the abstention theories cited quite fit the facts of *Alberti*. The *Alberti* court has already decided the federal issue; the state issue implicates only the remedy. Moreover, in resolving the

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8 The state also makes a general federalism argument, suggesting that "[a] federal court has no jurisdiction (no power) to act as arbiter between different levels of a State's government that are in dispute." Again, this argument mischaracterizes the action; the state is responsible for a federal constitutional violation. Unless the plaintiff were to be left with no remedy, the *Alberti* court had to apportion liability between the state and county. The relevant federal question, then, is the Eighth Amendment issue; the dispute between the state and the county implicates only the remedy.

state issue, the *Alberti* court simply adopted the approach of the only state court to have decided the issue pending a decision by a higher state court. *See County of Nueces*, No. 452,071 (holding that the state must compensate the county $40 per day for each ready-felon left in the county's jails more than seven days after sentencing).

In sum, the state courts should eventually determine whether the state or the county is responsible for ready-felons in the county's jails. The *Alberti* court's assessment of costs was "tentative" and "contingent on . . . the outcome of pending litigation in State courts over the allocation of costs for maintaining felons ready for transfer to the TDCJ-ID in county facilities." The issue, then, is whether the state or the county should pay for the housing of ready-felons in other county jails pending the resolution of the state litigation. If the state is found liable on remand, plaintiffs are entitled to their long-awaited remedy. The state's arguments seem to assume that the county should pay all housing costs until the state courts decide otherwise. But the presumption is baseless. Assuming the findings of state liability, the *Alberti* court chose the best available course in modeling relief on *County of Nueces*.

Because the liability findings against the county are far more problematic, we do not address the remedial issues raised by the county.

D. *Procedural issues:*

1. *The jurisdiction of the Alberti court to unilaterally impose the February 7 order.*

[11] The state does not argue, as it did in an earlier request for mandamus, that the February 7 order violates our opinion in *In re Clements*, 881 F.2d 145 (5th Cir. 1989). Instead, the state contends that the *Alberti* court was without jurisdiction to unilaterally impose the order because, in its September 25 findings of fact and conclusions of law, the

Alberti court transferred both the county's third-party complaint and the plaintiff's complaint against the state to the *Ruiz* court. In *In re Clements*, we transferred to the *Ruiz* court

> so much of the *relief* portion of the third-party complaint as seeks an injunction ordering our individual petitioners (in their official capacities) to receive or take prisoners into TDC confinement or to otherwise take action in the operation or management of TDC-operated confinement facilities.

In re Clements, 881 F.2d at 154. The September 25 transfer by the *Alberti* court was arguably broader than required by *In re Clements*; upon finding the state liable, the *Alberti* court

> ORDERED that County Defendants' third-party complaint and Plaintiffs' supplemental complaint are TRANSFERRED to the Honorable William Wayne Justice for proceedings in accordance with the mandamus opinion of the Fifth Circuit of Appeals entered in this case.

The *Alberti* court retreated in its February 7 order, however, where it stated:

> None of the remedial measures encompassed in this order affect the population cap imposed on TDCJ institutions as a result of the various orders and agreements in the *Ruiz* case, nor do they require the supersedence of the statutorily-based allocation formula adopted by the State defendants to protect the integrity of the *Ruiz* orders and agreements.

As evidenced by his separate February 7 *Ruiz* opinion, Judge Justice disagreed.

The cases cited by the state involve inter-district transfers. The plaintiffs contend that an intra-district transfer, by contrast, does not divest the transferor of jurisdiction. They point to the fact that both the *Alberti* and the *Ruiz* courts are a party of the Southern District of Texas and conclude that Judge DeAnda had the jurisdiction to impose the remedy regardless of the transfer. "Jurisdiction is lodged in a court, not in a person." *In re Brown*, 346 F.2d 903, 910 (5th Cir. 1965).

We need not address the distinction urged by the plaintiffs because we read the transfer order by the *Alberti* court to transfer only limited jurisdiction to the *Ruiz* court; the later joint hearings and joint orders reflect an intent to *share* jurisdiction over the third-party complaint and supplement complaint rather than to transfer jurisdiction entirely. In *In re Clements*, we suggested that "minor or indirect" effects on the state's prison system were within the sphere of *Alberti*, and in addition, saved to *Alberti* "plaintiffs' several motions in that case for orders establishing a limit or 'cap' on the number of inmates confined in the Harris County jail facilities (either as a whole or as to individual units)." *In re Clements*, 881 F.2d at 153. These reservations suggest that the February 7 order fell within the realm reserved to the *Alberti* court. Reading *In re Clements* to preclude an *Alberti* order with *any* effect on the state would leave the *Alberti* court powerless to remedy the overcrowding in the county's jails, since ready-felons account for such a large percentage of the jails' population.

2. *Procedural due process.*

The state also makes a general due process argument, suggesting that the *Alberti* court erred in issuing the February 7 order without a hearing. Given the large number of hearings held in *Alberti*, it is difficult to take this argument seriously. At any rate, it is clear from the record that the order was the direct product of a hearing held on October 22, 1990. The ordering schedule for the October 22 hearing specifically announced that

one of its purposes was to consider "the utilization of facilities in nearby counties which may have available jail space."

3. *The order of relief against the Texas Board of Pardons and Paroles.*

[12] The state next argues that the *Alberti* court erred in ordering relief against the Texas Board of Pardons and Paroles because the Board was not named a party to the action. The state emphasizes that, under Texas law, the Board is an independent agency. *See* Tex.Const. Art. IV § 11; Tex.Code Crim.Pro. Art. 42.18 § 1. In 1989, however, the Texas Legislature abolished the Board and transferred its duties to the Department of Criminal Justice, successor to the Department of Corrections. *See* Tex.Gen. & Special Laws 1989, Reg. Sess., Ch. 785 § 1.20. Because the Board of Pardons and Paroles is now part of the Department of Criminal Justice, we find no error.

4. *The supplemental complaint.*

Finally, the state argues that the *Alberti* court erred in allowing the plaintiffs to file a supplemental complaint against the state after the liability trials. As the county and plaintiffs point out, however, the state was a party to the action, a third-party defendant, during the trial. The state contends that its trial strategy would have been different had it been an actual defendant, but it does not explain why. Because the state has not sufficiently demonstrated prejudice, we find no error.

5. *Pending motions.*

On April 23, 1991, the *Alberti* court entered an order continuing its February 27 order in effect through September 15, 1991. The state moved to vacate the order, and the *Alberti* court denied the motion on May 1, 1991. On May 9, 1991, the state noticed its appeal of the April 23 order and moved this court to consolidate its appeals. The plaintiffs joined the motion

to consolidate the appeals, but the county moved the *Alberti* court to vacate the April 23 order on May 10, 1991, and argued that its motion to vacate rendered the state's appeal of the April 23 order premature. On May 20, 1991, the county conceded that its motion to vacate was untimely under Fed.R.Civ.P. 59(b), noticed its own appeal of the April 23 order, and requested that this court consolidate the appeals. Both the state and the county filed additional notices of appeal after the *Alberti* court denied the county's motion to vacate on June 4, 1991.

On May 28, 1991, the *Alberti* court entered an order requiring the sate to deposit an additional $1,000.000 with its registry by June 10, 1991. The state moved to vacate the order on June 3, 1991, demanding an answer by June 4, 1991. On June 5, 1991, when the *Alberti* court failed to "promptly" respond to the motion to vacate, the state moved this court to stay the order, arguing that the *Alberti* court had "effectively" denied its motion to vacate. The state also noticed its appeal of the May 28 order and moved this court to consolidate its appeals. The county opposed the stay, arguing that the state's motion presented the very same issues rejected by this court when we denied the state's motion to stay the February 7 order.

We grant both motions to consolidate the appeals and adopt the briefs already filed. Finally, we grant the motion of the state to consolidate its latest appeal filed on July 10, 1991, and its most recent petition for writ of prohibition docketed under cause number 91-2801 with the above referenced appeals, and to adopt the briefs on file.

In sum, we remand the case for the limited purpose of allowing the district court to enter findings regarding the issue of deliberate indifference, now required by *Seiter*. We leave to the discretion of the district court whether to take additional evidence or conduct any further proceedings in that court regarding this issue. We stay the orders of the district court which are the subject of this appeal, pending the district court's findings regarding deliberate indifference. The stay will abide

the district court's findings on the issue, vacating automatically, and without the need of a further order of this court should the district court find that the state was deliberately indifferent.

REMANDED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Lawrence R. ALBERTI, et al.,
Plaintiffs-Appellees,

v.

The SHERIFF OF HARRIS COUNTY,
TEXAS, et al., Defendants-Third Party
Plaintiffs-Appellants, Appellees,

In re Ann RICHARDS, the Governor
of Texas, et al., Third Party
Defendants-Appellants.

Nos. 90-2441, 90-6034, 91-2274
91-2801, 91-2946 & 91-6101.

Appeals From the United States District Court for the Southern
District of Texas

ORDER DENYING PETITION FOR WRIT OF
PROHIBITION AND STAY
AND PETITION FOR REHEARING

Before REAVLEY, HIGGINBOTHAM and DUHE', Circuit Judges.

BY THE COURT:

The State of Texas has petitioned for panel rehearing and has also requested that we order the district court not to

disburse $2,000,000 deposited by the state in the registry of the court.

The state argues that the legislature, by enacting H.B. 93, and the parties by their settlement agreement, have changed the legal relationship between the state and counties in ways that require reconsideration of our earlier opinion and warrant a stay of any disbursal below. We are unpersuaded and deny both the application for stay or writ of prohibition and petition for rehearing.

First, we are not persuaded that the Texas Legislature attempted to speak to the historical relationship between the state and its counties in the handling of prisoners. The state argues that H.B. 93 made clear that the duty owed to the counties that we found was, in fact, never owed. The state points to the statutory language that: "The legislature declares that until September 1, 1995 the institutional division shall continue to perform its duty to accept inmates only as provided by the allocation formula established under § 499.071." H.B. 93, § 11.02 (emphasis supplied). The argument continues that this language "makes clear" that Texas counties have always had the duty to house prisoners contracted for by the state in this suit; that H.B. 93 is a legislative ratification of the Texas Department of Criminal Justice's interpretation of its and the county's liability.

H.B. 93 also provided, however, that the counties were to continue to perform their duty to confine and maintain inmates at the county's own expense until the date the inmate is accepted into the institutional division, unless the state suits were settled by written agreement. So, the word continue could describe a time from August 29 forward, or it could describe a legislative view of both current and past legal relationships.

The state also points to certain legislative history; that the legislation which failed in the first called session provided for the payment of costs of transferring inmates to other

facilities from February 7, 1991. That legislation failed when the Senate refused to concur. Relatedly, the state points out that there ware no appropriations for paying the costs of transfers made before those ordered by the Jails Standards Commission after October 1, 1991. The sum of these events, the state argues, is that the legislature did not intend that the state would pay for "earlier debt." And, of course, the state says we should not meddle, because to do so would step hard on principles of federalism. We find this argument unpersuasive.

The federal court orders addressing the liability of the state for certain county prisoners were a lion in the street when the Texas Legislature addressed the problem in August 1991. An effort by the state to undo those orders by a declaration of state law or otherwise would have presented its own set of problems. Under these circumstances, we are persuaded that if the Texas Legislature had intended the actions now claimed for it by the state's lawyers, it would have said so in clear language. We are not persuaded that the legislature would have left such a large undertaking to inference and innuendo. The same is true for the later "settlement", conspicuous for its silence over the obligations of the state for costs incurred before August 29, 1991.

The petition for writ of prohibition, stay and panel rehearing are DENIED.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-2810

IN RE: WILLIAM P. CLEMENTS, JR., ET AL.,

Petitioners.

On Petition for Writ of Mandamus

Before JOLLY, HIGGINBOTHAM, and JONES, Circuit Judges.

BY THE COURT:

We are asked by Governor Clements and other state officials, through Jim Mattox, the Attorney General of Texas, for a stay of certain orders of the district court pending decision upon their petitions for writ of prohibition and mandamus. Petitioners seek relief from orders of the district court setting population caps for the number of inmates in the Harris County Jail. Under those orders, we are told, convicted felons will be released when the cap of 1,350 convicted felons is exceeded for 15 straight days. Petitioners urge that these releases will occur within twenty-four hours even though persons guilty of less serious offenses and pretrial detainees, all who pose less threat to the public safety, are available for release.

Petitioners' request for reconsideration of the district court's orders and for stay were denied on September 21, 1990.

We are persuaded that in the interest of justice, the application for stay of the 1,350 cap established by the Alberti court should be granted pending further order of this court. Counsel opposite will promptly reply to the petition, but, in any event, on or before October 1, 1990.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, et al.,	§	
Plaintiffs,	§	
v.	§	CIVIL ACTION
	§	NO. H-72-1094
SHERIFF OF HARRIS COUNTY, et al.,	§	
Defendants.	§	

ORDER

This case is before the Court on State Defendants' motion for a hearing on the current constitutional capacity of the Harris County Jail. Because it is not possible to schedule such a hearing before January, it is hereby

ORDERED

that the motion is DENIED at this time. Should the Court later determine that a full evidentiary hearing is necessary, the Court will advise counsel of a briefing and hearing schedule.

IT IS FURTHER ORDERED that pending such a hearing or other order of this Court addressing constitutional capacity, the Court's prior ruling that constitutional capacity is design capacity remains in full force and effect.

SIGNED this 2nd day of December, 1991.

_____

Chief Judge
United States District Court

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI,	§	
et al.,	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION
	§	NO. H-72-1094
SHERIFF OF HARRIS	§	
COUNTY, et al.,	§	
Defendants.	§	

ORDER

This case is before the Court on County Defendants' motion to extend the September 11, 1991 order and motion that the state defendants be required to deposit additional funds into the Court's registry. State Defendants have filed a written response to the motions. Because certain events outside the Court's control have delayed the entry of a permanent remedial decree as contemplated by the September 11 order, it is hereby

ORDERED

that the Court's order of September 11, 1991 is extended until altered by a subsequent permanent remedial order or other order of the Court. The Court notes that, pending a permanent remedial decree, its prior holding that the constitutional capacity of the jail facility is its design capacity continues in effect, establishing a current constitutional capacity of the Harris County jail facility at 8,698.

IT IS FURTHER ORDERED that the State Defendants shall deposit into the registry of the Court, fund 4:72cv1094-02, on or before December 16, 1991, the sum of three million dollars ($3,000,000.00) from which the County Defendants shall be authorized to pay up to $40.00 per day for each prison-ready felon transferred from the Harris County Jail Facilities to other Texas County detention facilities.

SIGNED this 25th day of November, 1991.

_____

Chief Judge
United States District Court

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, ET AL., Plaintiffs,	§	
VS.	§	
THE SHERIFF OF HARRIS COUNTY, TEXAS, ET AL., Defendants/ Third Party Plaintiffs,	§	
VS.	§	CIVIL ACTION NO. 72-H-1094
ANN RICHARDS, ET AL., Defendants/ Third-Party Defendants.	§	

ORDER

BE IT REMEMBERED that on this date came on to be heard COUNTY DEFENDANTS' Motion to Withdraw $2,000,000 and all accrued interest from the Court Registry, and for Expedited Consideration, said $2,000,000 having been deposited by the State Defendants on September 30, 1991, and the Court, after considering the motion filed herein, is of the opinion that the COUNTY DEFENDANTS' motion should be granted:

It is hereby ORDERED, ADJUDGED and DECREED that the COUNTY DEFENDANTS' Motion to Withdraw $2,000,000 and all Accrued Interest from the Court Registry, for the housing of and caring for prisoners ready for transfer to TDCJ-ID, all of whom were transferred in accordance with this Court's Orders, is hereby approved and GRANTED.

The Court ORDERS that the Clerk shall issue a check drawn on the Court's Registry to HARRIS COUNTY, TEXAS, in the amount of $2,000,000, together with all accrued interest thereon, and release the check to:

Harris County, Texas
c/o Harris County Attorney's Office
Attention: Harold M. Streicher
1001 Preston, Suite 634
Houston, Texas 77002
(713) 221-7164

SIGNED this the 25th day of October, 1991.

_____

JAMES DeANDA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI; ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
VS.	§	CIVIL ACTION
	§	NO. H-72-1094
THE SHERIFF OF HARRIS COUNTY, TEXAS; ET AL.,	§	
	§	
Defendants/ Third Party Plaintiffs,	§	
	§	
VS.	§	
	§	
ANN RICHARDS; ET AL.,	§	
	§	
Defendants/ Third-Party Defendants.	§	

ORDER

This case is before the Court on county defendants' second motion to require state defendants to deposit additional funds into the Court registry. The Court, after considering the motion filed herein, is of the opinion that the county defendants' motion should be granted. Accordingly, it is hereby

ORDERED that the county defendants' second motion to require state defendants to deposit additional funds

into the Court registry is GRANTED, and state defendants are hereby

ORDERED to deposit $2,000,000.00 into the Court registry on or before September 30, 1991, from which the county defendants shall be authorized to pay up to $40.00 per diem for each prison-ready felon transferred from the Harris County Jail Facilities to other Texas county detention facilities.

SIGNED this the 13th day of September, 1991, at Houston, Texas.

JAMES DeANDA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, ET AL., Plaintiffs,	§	
VS.	§	
THE SHERIFF OF HARRIS COUNTY, TEXAS, ET AL., Defendants/ Third Party Plaintiffs,	§	
VS.	§	CIVIL ACTION
	§	NO. 72-H-1094
ANN RICHARDS, ET AL., Defendants/ Third-Party Defendants.	§	

ORDER

BE IT REMEMBERED that on this date came on to be considered COUNTY DEFENDANTS' Motion to Withdraw $1,000,000.00 and all accrued interest from the Court Registry, and for expedited Consideration, said $1,000,000.00 having been deposited by the State Defendants on August 12, 1991, and the Court, after considering the motion filed herein, if of the opinion that the COUNTY DEFENDANTS' motion should be granted:

It is hereby ORDERED, ADJUDGED and DECREED that the COUNTY DEFENDANTS' Motion to Withdraw $1,000,000.00 and all accrued interest from the Court Registry, for the housing and caring for prisoners ready for transfer to TDCJ-ID, all of whom were transferred in accordance with this Court's Orders, is hereby approved and GRANTED.

The Court ORDERS that the Clerk shall issue a check drawn on the Court's Registry to HARRIS COUNTY, TEXAS, in the amount of $1,000,000.00, together with all accrued interest, on STATE DEFENDANTS' deposits of $750,000.00 and $1,000,000.00 into the Registry of the Court, and release the check to:

Harris County, Texas
c/o Harris County Attorney's Office
Attention: Harold M. Streicher
1001 Preston, Suite 634
Houston, Texas 77002
(713) 221-7164

SIGNED this the 13th day of September, 1991.

_____

JAMES DeANDA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, ET AL., PLAINTIFFS	§	
VS.	§	C. A. NO. H-72-1094
SHERIFF OF HARRIS COUNTY, ET AL., DEFENDANTS.	§	

ORDER

According to the report of the Fact-Finding Special Master, the County defendants first began to occupy their new detention facility, the so-called 701 Building, on July 31 when 24 worker-inmates were moved into the facility. As of September 10, 1991, 1,250 inmates were housed in the new facility, and the County defendants were well into the implementation of a phased-in occupation of the 701 Building that envisions the full utilization of that institution by the end of October, 1991. The County defendants anticipate housing 2,000 inmates in the 701 Building by September 19, 1991 and moving in an additional 500 prisoners weekly until the facility is full. Thus, by the end of October, the County defendants expect to have available in their correctional system approximately 8,696 beds (3,505 in the Franklin Street Jail, 776 in the Humble Detention Center, 415 in the renovated 301 Building, and about 4,000 in the new 701 Building).

On September 10, 1991, however, the County defendants also had housed in Harris County facilities and 13 other county facilities across the State of Texas a total

population of 9,600 prisoners. Of that total, 2,149 were felons ready for transfer to the Texas Department of Criminal Justice (TDCJ), who have been relocated from Harris County detention facilities to jails in other counties, leaving a population of 5,046 County prisoners and 2,405 TDCJ-ready felons incarcerated in Harris County facilities.

Presently outstanding orders of this Court require the State defendants to pay up to $40.00 a day per inmate to house TDCJ-ready prisoners moved out of Harris County to other County jails to keep the overall population of Harris County facilities, excluding the 701 Building, within an overall cap of 6,300 prisoners. Such payments were to continue until the opening by Harris County of its new 701 Building, scheduled for September 15, 1991, at which time the Court was to enter a new and permanent remedial decree.

The County defendants' plan for the gradual occupation of their new facility seems reasonable in light of both the security concerns and the multiple complexities associated with the construction and opening of a massive new correctional facility. The State defendants, therefore, will continue to be liable for the payment of the daily cost of housing TDCJ-ID-ready inmates in other County jails until October 31, 1991. The County defendants, however, are directed to occupy fully and expeditiously their new facility and to complete that occupation by no later than October 31, 1991; to maintain the population of their other facilities at levels currently mandated (6,300) and to return or reduce by attrition (i.e., through transfer, pursuant to the allocation formula, to TDCJ or parole in absentia) TDCJ-ready felons transferred to other County facilities. Harris County must move to occupy 100% of all of the beds in all of its detention facilities, present and future, as quickly as possible, and do all in its power, consistent with the orders of this Court, to lessen the financial burden on the State defendants for housing TDCJ-ready prisoners in outlying counties.

Meanwhile, parties have sought, thus far unsuccessfully, to extend the time within which they must file materials and summaries to the Special Master for inclusion in his report to the Court on Harris County sentencing patters and practices. The Special Master reports that he has not yet completed his review of the voluminous materials submitted by the State and County defendants, and that the County defendants are still processing additional data sought from and recently provided by the State defendants. To allow the presentation of all relevant, useful evidence, the State and County defendants are given until October 1, 1991 to provide the Special Master with any additional materials pertinent to his study, while the Special Master is directed to submit his report to the Court no later than October 15, 1991.

After the Special Master has filed his report with the Court, parties will be given an opportunity to file relevant objections, and the Court will determine whether further hearings are required.

IT IS SO ORDERED.

Signed this 11th day of September, 1991.

_____

Chief Judge
United States District Court

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, et al.,	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION
	§	NO. H-72-1094
	§	
SHERIFF OF HARRIS COUNTY, et al.,	§	
	§	
Defendants.	§	

FINDINGS OF FACT AND ORDER

This case is before the Court on remand from the United States Court of Appeals for the Fifth Circuit for findings regarding the issue of deliberate indifference on the part of the State and/or County defendants as now required under Wilson v. Seiter, _____ U.S. _____, 59 U.S.L.W. 4671 (June 17, 1991). Because of the emergency nature of the current overcrowding and medical conditions in the Harris County jail facilities, the Court considers it imperative that these findings be made immediately. Consequently, having reviewed the record in this case, the Supreme Court opinion in Wilson v. Seiter, and the July 25, 1991 opinion of the Fifth Circuit, the Court finds that the State defendants' and, to a much lesser degree, the County defendants' awareness of the extremely cruel conditions in the county facilities and their failure to take steps to remedy those conditions constitutes deliberate indifference as required by Seiter. The Court notes however, that the new County jail facility is scheduled to open next month. Once that facility becomes operational, the Court will revisit the issue of whether

the County defendants have any continuing liability in this case or whether they have taken all possible steps to correct the overcrowding and medical care problems in the Harris County jail system.

In accordance with the July 25 opinion of the Fifth Circuit, all prior orders of this Court which were previously stayed pending appeal are again in full force and effect upon entry of this order. Therefore, State defendants are directed to deposit within 48 hours of receipt of this order one million dollars ($1,000,000.00) into the Registry of the Court, fund 4:72cv1094-02. Additionally, the data and reports required by the Court's order of July 8, 1991 are due on or before August 12. As previously ordered by the Court, the parties are admonished that timely compliance with prior orders of the Court is imperative.

IT IS SO ORDERED.
SIGNED this 7th day of August, 1991.

_____

Chief Judge
United States District Court

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, ET AL., Plaintiffs,	§	
VS.	§	
THE SHERIFF OF HARRIS COUNTY, TEXAS, ET AL., Defendants/ Third Party Plaintiffs,	§	
VS.	§	CIVIL ACTION
	§	NO. 72-H-1094
ANN RICHARDS, ET AL., Defendants/ Third-Party Defendants.	§	

ORDER

BE IT REMEMBERED that on this date came on to be considered COUNTY DEFENDANTS' Motion to Withdraw $750,000.00 from the Court Registry, and the Court, after considering the motion filed herein, is of the opinion that the COUNTY DEFENDANTS' motion should be granted:

It is hereby ORDERED, ADJUDGED and DECREED that the COUNTY DEFENDANTS' Motion to Withdraw $750,000.00 from the Court Registry, for the housing and caring for prisoners ready for transfer to TDCJ-ID, all of whom

were transferred in accordance with this Court's Orders, is hereby approved and GRANTED.

The Court ORDERS that the Clerk shall issue a check drawn on the Court's Registry to HARRIS COUNTY, TEXAS, in the amount of $750,000.00, and release the check to:

Harris County, Texas
c/o Harris County Attorney's Office
Attention: Harold M. Streicher
1001 Preston, Suite 634
Houston, Texas 77002
(713) 221-7164

SIGNED this the 7th day of August, 1991.

JAMES DeANDA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, ET AL., PLAINTIFFS	§	
VS.	§	C. A. NO. H-72-1094
SHERIFF OF HARRIS COUNTY, ET AL., DEFENDANTS.	§	

ORDER

In view of the escalating problem of overcrowding in the Harris County detention facilities and in anticipation of the hearing to be held following the report of he Special Master as directed by the Court in its order of June 10, 1991, it is hereby

ORDERED

as follows:

(1) The scope of the Special Master's analysis and report shall include the effect on jail population of parole policies of the Texas Department of Criminal Justice ("TDCJ"), population caps at TDCJ, and any other factors that may impact on the jail overcrowding. The deadline for the Special Master's report is extended to August 31, 1991.

(2) In lieu of discovery, all parties shall submit to the Special Master on or before August 10, 1991 any statistical data, detailed reports of expert witnesses or

alternatively, detailed summaries of such expert's opinions and the bases therefor and a summary of the testimony of each witness to be called for the hearing relating to the analysis and report being prepared by the Special Master pursuant to the Order as amended by paragraph (1).

Any evidence not disclosed as required by Paragraph (2) of this Order shall be excluded by the Court unless good cause for the noncompliance is shown.

SIGNED this 8th day of July, 1991.

James DeAnda
Chief Judge
United States District Court

APPENDIX M

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, ET AL., PLAINTIFFS	§	
VS.	§	C. A. NO. H-72-1094
SHERIFF OF HARRIS COUNTY, ET AL., DEFENDANTS.	§	

ORDER

The population of Harris County detention facilities is again assuming alarming proportions. As of May 31, 1991, 7877 prisoners were housed in the County's various facilities, while another 645 are currently housed in other county jails around the State. The monitors report that the excess of felony commitments in Harris County to the Texas Department of Criminal Justice (TDCJ) over the number of felons removed from county facilities through transfer to TDCJ or other expedited parole processes has been running at an average of over 80 prisoners a week since early February. This means that when the County's massive new jail opens in September, with its additional 3800 beds, the defendants will still be about ten percent over the design capacity of their entire existing detention system. If the defendants close the Detention Center, as their present plans envision, they will be at 115 to 120 percent over design capacity. This Court has long been led to view the opening of the new jail as a critical milestone marking the end of the County's overcrowding crisis, but this analysis of accelerating population makes a mockery of that promise.

The statutory efforts of the most recent session of the Texas Legislature promise no resolution to either the State's or the County's overcrowding problems now or in the near future. Nor is there any sign of amicable settlement of the continuing bitterness between the State and the County over correctional issues. The State defendants, meanwhile, continue to criticize sharply the failure of Harris County judges and criminal justice officials to implement fully and utilize effectively the array of intermediate sanctions underwritten by HB2335 funding.

It is imperative that this Court begin now to explore for enduring remedies in this case that offer some hope of curbing overcrowding, while reducing federal judicial intervention in the correctional affairs of Harris County. The remedies adopted to date by this Court have been, at best, stop-gap measures that have proven unequal to the task of effectively reducing population. Over the past several years, the Texas legislature, while allocating funds for the construction of some additional cells, has opted to deal with current overcrowding by creating a structure of administrative good time that accelerates the eligibility of prisoners for parole to the point where the vast majority of prison sentences are now served in about one-twelfth of the assessed time. A series of violent, heinous crimes committed in Harris County by parolees recently released from prison after serving only small fractions of their sentences has eroded public confidence in the criminal justice system, and any further acceleration of releases, even for misdemeanors, will totally undermine that trust and render impotent the deterrent effect of incarceration. Only repudiation of the Bill of Rights is worse. Transfers of inmates to other counties have been plagued by formidable logistical problems and, in the best of circumstances, present only a finite alternative housing resource. None of the defendants are receptive to temporary housing as a viable alternative. The creation of intermediate sanctions has had disappointingly little effect to date. The complexity of the overcrowding problem, a root cause of constitutional deficiencies, has so far defied every remedial approach.

Over the past three years, the Court has repeatedly urged the State and County defendants to help the Court identify and articulate some remedial framework to meet constitutional requirements. Instead, the defendants have engaged in unremitting mutual fault-finding and recimination, and provided the Court with little or no guidance in th search for an effective remedy. As we approach the next major milestone in this case, that pattern cannot be repeated.

I therefore direct the Fact Finding Special Master to prepare a detailed analysis and review of sentencing patterns in Harris County, with special emphasis on the extent to which state district court judges use available pre-trial service and intermediate sanctions and the extent of disparity in bail and sentencing practices. For some two years now, the State defendants have insisted that Harris County criminal sentences are excessively harsh and punitive. I direct the Fact Finding Special Master to attempt to assess the validity of this characterization and report his findings to the Court. To the extent that such resources exist, the Fact Finding Special Master is directed to incorporate in his report applicable findings from existing research efforts in these same areas.

The Fact Finding Special Master shall file his report with the Court within 60 days, so hearing may be held on his findings and any other matters relevant to a post-September remedy in this case. Because of the need for haste in the compilation of this report, the Fact Finding Special Master is specifically authorized to employ such additional assistants or independent specialists as may be necessary to perform this expedited analysis and review. Costs of the review shall be assessed initially against the County defendants, although the ultimate allocation of costs for the study shall be determined when the Court sets and allocates appropriate fees and expenses in this case.

SIGNED THE 10th day of June, 1991.

James DeAnda
Chief Judge
United States District Court

APPENDIX N

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, et al.,	§	
Plaintiffs,	§	
v.	§	CIVIL ACTION
	§	NO. H-72-1094
SHERIFF OF HARRIS COUNTY, et al.,	§	
Defendants.	§	

ORDER

In accordance with the orders of this Court entered February 7, 1991, March 15, 1991 and April 23, 1991, it is hereby

ORDERED

that the State Defendants shall deposit into the registry of the Court, fund 4:72cv1094-02, on or before June 10, 1991, the sum of one million dollars ($1,000,000.00) from which the County Defendants shall be authorized to pay up to $40.00 per day for each prison-ready felon transferred from the Harris County Jail Facilities to other Texas County detention facilities.

SIGNED this 28th day of May, 1991.

_____

Chief Judge
United States District Court

APPENDIX O

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI; ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
VS.	§	CIVIL ACTION
	§	NO. H-72-1094
SHERIFF OF HARRIS COUNTY, TEXAS; ET AL.,	§	
	§	
Defendants,	§	
	§	
VS.	§	
	§	
WILLIAM P. CLEMENTS; ET AL.,	§	
	§	
Third-Party Defendants.	§	

ORDER

The Court's current remedial order of February 7, 1991, as modified on March 15, 1991, remains in effect only until May 1, 1991, also the date on which oral argument is scheduled before the United States Court of Appeals for the Fifth Circuit on the various petitions and appeals filed in this case. So that the appellate court may know the intended course of this Court's continued remedy, it is important that the next order be issued promptly.

As of April 15, 1991, the population of the Harris County detention facilities was 7,565, or 1,265 over the cap imposed in the February 7, 1991 Order. The State defendants deposited $750,000.00 in the Registry of the Court on April 2, 1991. Since then, the County defendants have transferred only 250 convicted felons ready for transfer to the Institutional Division of the Texas Department of Criminal Justice (TDCJ-ID) to other county jails. Another 120 prisoners are scheduled for transfer during the week of April 15, 1991, but it is reportedly unlikely that the County defendants will be able to transfer more than 360 prisoners by the end of April, leaving the total population some 1,200 prisoners over the cap at the expiration of the current order on April 30, 1991. The County defendants, thus, have failed to comply with the terms of the February 7, 1991 Order, as amended on March 15, 1991.

The County defendants cite the difficulties of completing legal and financial arrangements for the ordered transfers, especially in light of the uncertainty over funding which was not resolved until April 1, 1991, and report that they are ready to transfer up to 1,500 prisoners in May, if required to do so.

It is necessary to repeat the warnings contained in the Court's March 15, 1991 Order. When that order was issued, the overall population of the Harris County detention facilities stood at 7,376, or 157 percent of their design capacity; now, it is at 7,565, or 161 percent of the design capacity. This present total exceeds by 1,565 that number of prisoners the Alberti monitor and the State defendants' expert testified could be managed safely and securely for even a limited period of time. These population figures are approaching crisis proportions. As noted on March 15, 1991: "We are talking here about life and death, and the most fundamental rights of the plaintiff class." The danger to the plaintiffs has grown, not diminished, over the past two months.

In the meantime, the State appellate court has not yet decided pending litigation over the allocation of responsibility and costs for the maintenance of felons ready for transfer to TDCJ-ID in county detention facilities, nor has the State legislature dealt definitively with that issue. At the same time, the Fifth Circuit is now reviewing the various pending petitions and appeals in this case.

In accordance with the foregoing, it is ORDERED:

1. That the remedial decree entered in this case on February 7, 1991, as modified on March 15, 1991, shall remain in effect until September 15, 1991. The State defendants shall be required to deposit in the Registry of the Alberti Court additional deposits when the Court is notified by the County defendants that the original $750,000.00 deposited by the State defendants on April 2, 1991 is exhausted, unless the Fifth Circuit directs otherwise after its consideration of the parties' petitions and appeals.

2. As before, the Court specifically retains jurisdiction over this matter.

SIGNED this 22nd day of April, 1991, at Houston, Texas.

JAMES DeANDA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX P

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI; ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
vs.	§	CIVIL ACTION
	§	NO. H-72-1094
JOHNNY KLEVENHAGEN; ET AL.,	§	
	§	
Defendants.	§	

ORDER

The State defendants in this case have sought to vacate or stay the Court's remedial order signed February 7, 1991, while the plaintiffs and the County defendants seek a number of modifications to the same order.

The State's motion to vacate or stay the order is DENIED. According to the most recent statistics provided by the County defendants to the parties and the Court, the population of Harris County detention facilities on Monday, March 11, 1991, was at 7,376 prisoners or 157 percent of the design capacity of those facilities. This number exceeds by 1,376 the number of prisoners the Alberti monitors and the State defendants' own witness testified could be managed safely and securely for even a limited period of time. These population figures are beginning to approach these numbers that led to the outbreak of a respiratory, pneumococcal epidemic that struck down dozens of inmates and claimed two lives in mid-1989. We

are talking here about life and death, and the most fundamental rights of the plaintiff class.

The February 7, 1991 order carefully refrained from actions with a direct and substantial effect on the Texas prison system. In In re Clements, the Fifth Circuit transferred to the Ruiz court only "so much of the remedy portion of the Alberti third-party action as seeks to enjoin them to receive or take prisoners into TDC confinement (or to otherwise take action in the operation or management of TDC-operated confinement facilities)." 881 F.2d 145, 153 (5th Cir. 1989). A requirement that the State defendants provide funds to underwrite tentatively the transfer of felons to other county jails represents no departure from the Fifth Circuit's directive. As understood by this Court, the Fifth Circuit did not immunize the State defendants from contributing in any form to the remediation of unconstitutional conditions for which they have been found liable.

This Court's February 7, 1991 order did not impose final responsibility on the State for the cost of any transfers required pursuant to the Order. Rather, that Order expressly recognized that the allocation of responsibility and costs for the maintenance of felons ready for transfer to the Institutional Division of the Texas Department of Criminal Justice (TDCJ-ID) was an issue in litigation currently pending in the State courts and that the outcome of that litigation will determine any appropriate final accounting for these costs in this case. That the February 7, 1991 order included a preliminary assessment at all was due to the fact that other Texas counties could not be expected to receive felons ready for transfer to TDCJ-ID from Harris County without advance payment. Representatives of the Sheriff's Department have testified that counties contacted by the County defendants refused to consider any transfers from Harris County without the promise of immediate payment. There is, then, no issue of abstention here, nor, ultimately, are Eleventh Amendment and Pennhurst principles raised by the Court's February 7, 1991 order, which, while seeking to address immediate and critical constitutional deficiencies, left to State

courts any final accounting. Given all of these circumstances, it is hard to identify another case in which the burden of suffering irreparable and substantial harm rests more clearly on the party opposed to the movant. The State defendants' motion to delay further the relief of unconstitutional conditions in Harris County detention facilities is DENIED.

In response to the motions of the plaintiffs and the County defendants, the following modifications to the February 7, 1991 order are adopted:

1. Paragraph 1 of that order is amended to read:

> This remedial decree supersedes all previous remedial orders in this case that conflict with the terms of this order, and shall remain in effect until Mav 1, 1991.

2. Paragraph 2 of the February 7, 1991 order which reads:

> The overall population of Harris County detention facilities shall be reduced to 6,300 within 45 days of the entry of this order. Within that overall cap, the County population shall not exceed 4,725, or 75 percent of the overall population, and shall include convicted felons not ready for transfer to TDCJ-ID and parole violators. The population of convicted felons in Harris County detention facilities ready for transfer to TDCJ-ID shall not exceed 1,575, or 25 percent of the overall population.

is amended to read as follows:

> The overall population of Harris County detention facilities shall be reduced to 6,300 within 45 days of the entry of this order. Within that over-

> all cap, the County population shall not exceed 4,725, or 75 percent of the overall population, and shall include convicted felons not ready for transfer to TDCJ-ID and parole violators. The population of convicted felons in Harris County detention facilities ready for transfer to TDCJ-ID shall not exceed 1,575, or 25 percent of the overall population. In any event, the total population of Harris County detention facilities shall not exceed 6,300 for more than seven consecutive days without triggering the transfer provisions of this order.

3. That portion of paragraph 3 of the February 7, 1991 order which reads:

> If necessary to meet the overall population cap of 6,300 described in paragraph 2, above, the Sheriff of Harris County shall transfer prisoners ready for transfer to TDCJ-ID with sentences of from five to no more than 15 years in groups of 25 inmates to other Texas County detention facilities identified and selected by the Sheriff.

is amended to read as follows:

> If necessary to meet the overall population cap of 6,300 described in paragraph 2, above, the Sheriff of Harris County shall transfer prisoners ready for transfer to TDCJ-ID with sentences of five or more years to such other Texas County detention facilities that meet the minimum standard of the Texas Commission on Jail Standards and are identified and selected by the Sheriff. Transfers made pursuant to this provision shall be conducted once weekly.

4. That portion of paragraph 4 of the February 7, 1991 order which reads:

> The County defendants shall file a bond for $750,000.00 with the Registry of the Alberti Court by March 20, 1991 in the event that the State defendants prevail on the issue of cost allocation in the pending State litigation.

is amended to read as follows:

> The County defendants shall file with the Registry of the Alberti Court by March 20, 1991 a resolution adopted and passed by the Commissioners Court of Harris County that the County "is financially able to and has adequate resources from which to pay $750,000.00 in the event State defendants ultimately prevail on the issue of cost allocation."

5. Paragraph 6 of the February 7, 1991 order is amended to read as follows:

> The County defendants shall staff and occupy the new boot camp at the Detention Center in Humble by May 1, 1991 and the residential probation program in the 701 Building by September 1, 1991.

All other modifications sought by the parties to the February 7, 1991 order are DENIED.

SIGNED this 15th day of March, 1991, at Houston, Texas.

JAMES DeANDA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX Q

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, et al., Plaintiffs,	§	
v.	§	
SHERIFF OF HARRIS COUNTY, TEXAS, et al.,	§	Civil Action No. 72-H-1094
Defendants, and Third-Party Plaintiffs,	§	
v.	§	
WILLIAM P. CLEMENTS, et al., Third-Party Defendants.	§	

MEMORANDUM OPINION

On February 7, 1991, the Honorable James DeAnda, Chief Judge of the United States District Court for the Southern District of Texas, as the sitting judge in this action, entered an order, part of which directed the State third-party defendants to deposit in the registry of the Alberti court $750,000.00, to be used to pay the costs of detaining in other county detention facilities some of Harris County's overflow inmates who have been sentenced to the Texas Department of Criminal Justice - Institutional Division. In response to that order, the State defendants filed its motion to vacate or to stay the order, directing its motion both to Judge DeAnda and to myself, as the sitting judge in Ruiz v. Estelle, 503 F.Supp. 1265 (S.D. Tex.

1980), aff'd in part and vacated in part, 679 F.2d 1115, amended in part, 688 F.2d 266 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983).[1]

As I explained in the memorandum opinion I filed contemporaneously with Judge De Anda's February 7 Order, I did not join with that portion of the order relating to the deposit of $750,000.00, for two reasons. First, I noted that I had not been directed to any portion of the record, developed before Judge DeAnda in Alberti, which relates to whether or how an order requiring the State to pay $750,000.00 into the court registry will affect the State's ability to comply with the orders entered in Ruiz. Without an appropriate reference to the record in that respect, I could not determine whether that specific party of the relief ordered would fall within the category of matters arising out of the Alberti litigation which the Fifth Circuit, in In re Clements, transferred to the Ruiz court. Second, I explained that if the question whether Texas law requires the State to bear the costs of confining some of Harris County's overflow Institutional Division-ready inmates were placed before me, my understanding of principles of abstention would lead me to refrain from ruling on it.

In regard to the pending motion of the State defendants, I should make two observations. First, because I did not join in entering the order to which the State's motion is addressed, I cannot properly grant the relief the State defendants now seek. See Gallimore v. Missouri Pac. R. Co., 635 F.2d 1165, 1171-72 (5th Cir. 1981). Second, with regard to the question whether or

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[1] After the Governor of the State of Texas, the Director of the Texas Department of Corrections, the members of the Texas Board of Corrections, and the State of Texas were made third-party defendants in the Alberti action, the Court of Appeals for the Fifth Circuit directed the transfer to the Ruiz court of "so much of the relief portion of the third-party complaint [in Alberti] as seeks an injunction ordering [the State defendants] to receive or take prisoners into TDC confinement or to otherwise take action in the operation or management of TDC-operated confinement facilities." In re Clements, 881 F.2d 145, 154 (5th Cir. 1989) (emphasis in original).

how requiring the State to pay $750,000.00 into the registry of the Alberti court would affect the State's ability to comply with Ruiz, I take note of the excerpts from the testimony in Alberti of David McNutt, Assistant Director for Budget and Managing Services for the Institutional Division of the Texas Department of Criminal Justice, attached as exhibit D to the State's motion, which is incorporated herein by reference. After consideration of that testimony, I conclude that the State's ability to comply with the orders entered in Ruiz will be endangered by the requirement that it pay $750,000.00, and possibly more, for the detention of some of Harris County's overflow Institutional Division-ready inmates. To be specific, I find that this aspect of the relief ordered against the State defendants likely will adversely affect their ability to operate and manage TDCJ-operated confinement facilities in such manner as to comply with the Ruiz decree. I would note that I do not find any other aspect of the relief Judge DeAnda has directed in the February 7 order to conflict in any way with the provisions of the Ruiz decree.

SIGNED this 15th day of March, 1991.

William Wayne Justice
United States District Judge

APPENDIX R

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, et al., Plaintiffs,	)	
v.	)	
SHERIFF OF HARRIS COUNTY, TEXAS, et al., Defendants/Third-Party Plaintiffs,	)	C. A. No. 72-H-1094
v.	)	
WILLIAM P. CLEMENTS, et al., Third-Party Defendants.	)	

ORDER

Since early 1990, the combined Courts* have searched for some feasible and equitable solution to the overcrowding problem in Harris County detention facilities. After the Alberti Court found conditions in those facilities unconstitutional and both the State and County defendants liable for such conditions, the combined Courts supervised lengthy negotiations among the

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*In August, 1989, the U. S. Court of Appeals for the Fifth Circuit issued a writ of mandamus directing the coordination of remedies in the instant case with prior directives of the federal district court in Ruiz v. Lynaugh, 503 Fed. Supp. 1265 (S.D. Tex. 1980); In re William P. Clements, et al., No. 89-2706 (1989). Pursuant to those directions, the Alberti and Ruiz courts have conducted joint hearings on remedial issues and in the Alberti case and issued joint remedial orders.

parties and conducted lengthy hearings on proposed remedial plans. On April 5, 1990, the Courts entered a remedial order imposing a series of progressively reduced caps on the population of the Harris County detention facilities. The order directed the State defendants to remove from Harris County facilities a specific number of convicted felons ready for transfer to the Institutional Division of the Texas Department of Criminal Justice (TDCJ-ID) and provided for automatic awards of administrative good time to certain limited classes of convicted felons if the State defendants failed to remove the specified number of prisoners. The order also provided for the releases of convicted misdemeanants and pre-trial detainees, commencing with those least likely to pose a threat to public safety, if the County defendants failed to reduce the number of County prisoners to prescribed levels.

That April order lapsed on August 31, 1990, by which time the State defendants had removed the required number of felons ready for transfer to TDCJ-ID. The number of County prisoners exceeded the applicable cap by 254 inmates on August 31, 1990, and releases of pre-trial detainees and misdemeanants occurred in early September. Meanwhile, after further hearings, the combined Courts entered a new remedial order on September 7, 1990. This order extended the existing overall population cap of 6,100 prisoners on the Harris County detention facilities to December 31, 1990, when a further reduction to 6,000 was required. The order also imposed internal caps on the State and County, with the State being limited to 1,350 felons ready for transfer to TDCJ-ID and the County being limited to a total of 4,750 prisoners. As in the previous order, the new mandate provided for expedited awards of good time to accelerate the release on parole of felons and ordered the direct release of certain pre-trial detainees and misdemeanants if the parties were unable to meet their respective internal caps.

Since neither set of defendants was able initially to meet its internal cap, both sought a stay from the combined Courts,

while the State defendants also sought prematurely a stay from the Fifth Circuit Court of Appeals. Hearings before the Alberti Court followed, during which State and County defendants argued for a moratorium on any further releases and sought additional time to develop alternatives other than releases for dealing with the excess population. On October 24, 1990, the combined Courts, without ruling on the defendants' applications for a stay, ordered the parties to meet with the Special Master in the Alberti and Ruiz cases and attempt to generate some acceptable plan for dealing with the population problem that did not rely on releases.

During September and October, 1990, meanwhile, the State and County defendants had expedited their cooperative work on developing, funding and implementing programs for intermediate, alternative sanctions pursuant to House Bill 2335, passed by the Texas Legislature in 1989 to encourage the development of local correctional programs and facilities for felons traditionally sentenced to TDCJ-ID. In early November, the defendants reported significant progress in the development of these programs and the Alberti Court granted the defendants a further extension of 50 days on November 19, 1990 within which to attempt to implement sufficient alternative program plots to reduce the number of felons committed to TDCJ-ID in Harris County detention facilities.

While a substantial number of programs for intermediate sanctions has been created in the intervening 60 days, State District Court judges have only begun to integrate them into regular sentencing patterns. While there has been some reduction in the number of felons committed weekly to Harris County detention facilities for delivery to TDCJ-ID, that number continues to exceed the number of felons removed from Harris County detention facilities weekly through transfer to TDCJ-ID or released on parole by an average of some 50 prisoners. According to statistics provided to the court by the County defendants through the Special Master, the total population of prisoners in Harris county detention facilities on January

21, 1991 was 6,715, 715 prisoners over the currently applicable overall population cap of 6,000. With the excess of commitments over removals running at an average of 50 a week, we can anticipate a monthly increase in total population of some 215, assuming, of course, that the County defendants manage to hold their numbers in check. If that rate of growth continues, we are looking at numbers in excess of 7,300 within the next 50 days, unless steps are taken forthwith to limit or reduce the population. In hearings in August, 1990, both the Alberti Special Master and the State defendants' expert testified that Harris County detention facilities could probably be managed safely and securely for a limited period at a population level somewhere between 5,500 and 6,000. Even more alarming is the specter that, if the current numbers continue unabated, the County prisoner population will exceed the County's design capacity within 30 days of the opening of its new 4,000-bed 701 Building scheduled to be ready for occupancy on September 1, 1991.

In the long term, probably the best hope for County and State defendants alike is a rapid expansion in the utilization of intermediate sanctions developed pursuant to HB 2335. The Count defendants have proven themselves capable of creating the programs needed for such sanctions, but the reluctance of State District Court judges to use them is beyond the reach of the federal court in this case. But let no one be misled by the consequences of sate judges' preference for prison sentences and their disregard for alternative sanctions. It is no great blow for law and order to send so many offenders to prison that the only way the State can handle them is to accelerate their release. Present policies and practices are making a mockery of criminal sanctions and churning people through the prison system so rapidly, there is scarcely any sanction at all. The result is the increasingly widespread erosion of public confidence in the criminal justice system. The furor last September over releases in Harris County was simply symptomatic of a much deeper, growing public anger.

The State defendants, meanwhile, after earlier appealing the November 19, 1990 Order that gave parties an additional 60 days to develop alternatives, have now filed a motion seeking to extend that same order. February marks the 39th month, dating from September, 1988 since the Alberti Monitors identified the overflow of felons ready for transfer to TDCJ-ID as a serious problem contributing substantially to unconstitutional conditions in Harris County detention facilities. The time for further delay has passed and the State defendants' motion is denied.

The next construction milestone for the County defendants comes at the end of April, 1991, when they are due to open a boot camp for 382 prisoners and a residential probation facility for 192 convicted offenders. Recognizing the State and County defendants' efforts to expand both the implementation and use of intermediate sanctions pursuant to HB 2335, the need to avoid further direct releases or releases accomplished through the further acceleration of parole; and the existence of pending litigation in the state courts over the allocation of responsibility and costs for the maintenance of felons ready for transfer to TDCJ-ID in county detention facilities. What is called for is a short-term remedial decrees that is designed to bridge the gap between the present and the next construction milestone, which leaving room for the State and County defendants to continue and expand their present separate and joint efforts to contain their respective populations, but one that also sets some limits on immediate overall population growth and provides tools for addressing continued overcrowding. None of the remedial measures encompassed in this order affect the population cap imposed on TDCJ institutions as a result of the various orders and agreements in the Ruiz case, nor do they require the supersedence of the statutorily-based allocation formula adopted by the State defendants to protect the integrity of the Ruiz orders and agreements.

It is therefore ORDERED:

1. This remedial decree supersedes all previous remedial orders in this case, and shall remain in effect until May 1, 1991.

2. The overall population of Harris County detention facilities shall be reduced to 6,300 within 45 days of the entry of this order. Within that overall cap, the County population shall not exceed 4725, or 75 percent of the overall population, and shall include convicted felons not ready for transfer to TDCJ-ID and parole violators. The population of convicted felons in Harris County detention facilities ready for transfer to TDCJ-ID shall not exceed 1575, or 25 percent of the overall population.

3. If necessary to meet the overall population cap of 6,300 described in paragraph 2, above, the Sheriff of Harris County shall transfer prisoners ready for transfer to TDCJ-ID with sentences of from five to no more than 15 years in groups of 25 inmates to other Texas county detention facilities identified and selected by the Sheriff. Any such felons transferred to other county detention facilities shall continue to be Harris County prisoners until they are released on parole in absentia (PIA), or moved to a pre-parole transfer program (PPT) or transferred to TDCJ-ID under Harris County's weekly allocation.

4. The State defendants shall deposit in the Registry of the Alberti Court $750,000.00 by March 20, 1991, from which the County defendants shall be authorized to pay up to $40.00 per diem for each transferred inmate. The county expenditures shall be reimbursed from this fund upon application to the court and upon approval and order of payment by the court. If this initial fund is exhausted prior to the expiration of this Order, the Court shall direct such additional deposits as may be necessary to carry out the terms of the Order. The County defendants shall pay the costs of transportation. If the County population exceeds its internal cap of 4,725 prisoners, the County defendants shall be required to

pay the per diem cost for each prisoner in excess of the 4,725-cap on any one day, although only TDCJ-ID-ready felons shall actually be transferred. Thus, for example, if the County population on a given day is 4,750, the County defendants shall be responsible for paying the per diem for 25 of the TDCJ-ID ready felons transferred to other county jails on that day.

This assessment of costs is tentative and preliminary and shall be reevaluated and finalized contingent on (1) the outcome of pending litigation in State courts over the allocation of costs for maintaining felons ready for transfer to TDCJ-ID in county facilities; and (2) the extent to which HB 2335 alternatives are implemented in Harris County and the number of felons committed to TDCJ-ID is reduced. The County defendants shall file a bond for $750,000.00 with the Registry of the Alberti Court by March 20, 1991 in the event that the State defendants prevail on the issue of cost allocation in the pending State litigation.

5. The County defendants shall continue to be required to do everything necessary to occupy the new 701 building by September 1, 1991. They shall continue to provide funding for and conduct the recruitment, hiring and training of staff to operate the 701 Building. The County defendants shall be assessed a substantial daily fine for each day beyond September 1, 1991 they fail to occupy the 701 Building. "Occupy" in this context refers to the housing of a substantial number of prisoners, not a token contingent.

6. The County defendants shall staff and occupy the new boot camp at the Detention Center in Humble and the residential probation program in the 701 Building by April 15, 1991.

7. The County and State defendants shall continue to cooperate to expand and implement intermediate sanctions pursuant to HB 2335. The County defendants shall take all measures required to keep State District Court judges knowledgeable about the nature and availability of these sanctions.

8. Between the date of the entry of this order and May 1, 1991, the State defendants shall maintain the current allocation formula for admissions to TDCJ-ID pursuant to Tex. Rev. Civ. Stat. Ann. art. 6166a-4. That proportional share of admissions to TDCJ-ID shall apply to all additional capacity that becomes available during the period covered by this order. The State defendants may take any other steps consonant with State law and federal court orders to reduce the TDCJ-ID ready population in Harris County detention facilities.

9. The County defendants shall compile and submit to the State defendants every ten days a list of prisoners potentially eligible for parole in absentia (PIA) or pre-parole transfer (PPT) together with the necessary paperwork on each identified prisoner. The County defendants shall be responsible for forwarding the necessary paperwork on eligible prisoners within ten days of their receipt of the requisite paperwork from courts or prosecutors. The State defendants shall take final action on parole within 45 days of receiving notification from all personnel that a prisoner is eligible, together with the receipt of all necessary paperwork. The period of time consumed by the "Notice to Trial Officials" procedures shall not be included in this 45-day time limit. The State defendants shall be required to take final action on prisoners eligible for PPT within 45 days subject to the availability of PPT beds.

10. The Court specifically retains jurisdiction over this matter.

SIGNED this 7th day of February, 1991, at Houston, Texas.

JAMES DeANDA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

91-1202

FILED
JAN 17 1992
OFFICE OF THE CLERK

No. ____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM 1991

Ann Richards, Governor of Texas; Selden Hale, III, Mamie Moore Proctor, Hon. Clarence N. Stevenson, Allan B. Polunsky, James M. Eller, F. L. Stephens, Jerry H. Hodge, Joshua W. Allen, Sr., Ellen J. Halbert, Members, Texas Board of Criminal Justice; James A. Lynaugh, Executive Director, Texas Department of Criminal Justice,

Petitioners

v.

John Lindsay, Harris County Judge; El Franco Lee, Jim Fonteno, Steve Radack, Jerry Eversole, Harris County Commissioners; Johnny Klevenhagen, Harris County Sheriff,

Respondents

v.

Lawrence R. Alberti, Jimmy E. Collins, Henry C. Langer, Jose' J. Pina, II, Pat Reed, Wesley Sellers, individually and on behalf of all others similarly situated,

Respondents

On Petition for Certiorari
To the United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI
Appendices S-AA

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APPENDIX S

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, et al., Plaintiffs,	§	
v.	§	
SHERIFF OF HARRIS COUNTY, TEXAS, et al., Defendants, and Third-Plaintiffs,	§	Civil Action No. 72-H-1094
v.	§	
WILLIAM P. CLEMENTS, et al., Third-Party Defendants.	§	

MEMORANDUM OPINION

I write separately to clarify my relationship to the relief set forth in the order entered contemporaneously herewith by the Hon. James DeAnda, Chief Judge of the United States District Court for the Southern District of Texas, as the sitting judge in Lawrence R. Alberti, et al. v. the Sheriff of Harris County, Texas, et al., civil action No. 72-H-1094, with which I have only one point of disagreement.

My connection with the Alberti litigation arises from my position as sitting judge in Ruiz v. Estelle, 503 F.Supp. 1265 (S.D. Tex. 1980), aff'd in part and vacated in part, 679 F.2d 1115, amended in part, 688 F.2d 266 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983). After the Governor of the State

of Texas, the Director of the Texas Department of Corrections, the members of the Texas Board of Corrections, and the State of Texas were made third-party defendants in the Alberti action, the Court of Appeals for the Fifth Circuit directed the transfer to the Ruiz court of "so much of the relief portion of the third-party complaint [in Alberti] as seeks an injunction ordering [the state defendants] to receive or take prisoners into TDC confinement or to otherwise take action in the operation or management of TDC-operated confinement facilities." In re Clements, 881 F.2d 145, 154 (5th Cir. 1989) (emphasis in original).

While the relief Judge DeAnda now orders clearly is within the scope of Alberti, one aspect of the order seemingly falls within the category of matters within the purview of the Ruiz court. After directing the transfer to other county detention facilities of some of Harris County's overflow inmates who have been sentenced to the Texas Department of Criminal Justice - Institutional Division, Judge DeAnda directs that "[t]he State defendants shall deposit in the Registry of the Alberti court $750,000.00 by March 20, 1991, from which the County defendants shall be authorized to pay $40.00 per diem for each transferred inmate." I have not been directed to any portion of the evidence in Alberti which relates to whether or how an order requiring the State to pay $750,000.00 into the court registry will affect the State's ability to comply with the orders entered in Ruiz. Without an appropriate record in that respect, I cannot agree to that specific part of the relief ordered.

I also would note that if the question whether Texas law requires the State to bear the costs of confining some of Harris County's overflow Institutional Division-ready inmates were placed before me, my understanding of principles of abstention would lead me to refrain from ruling on it. The issue underlying the cost question is the relative responsibilities of the state and the counties for Institutional Division-ready detainees. The matter plainly is one of substantial public concern. Furthermore, developments in the law of Texas relating to the issue indicate that the question is an unsettled one.

First of these developments is Tex.Rev.Civ.Stat.Ann. art. 6166a-4 (Vernon 1991), which became effective March 20, 1990, and which directs the Texas Board of Criminal Justice to establish a formula for allocating the number of inmates that each Texas county can transfer to the Institutional Division each week. The statute requires the Board to consider factors which "shall include but are not limited to:"

(1) the percentage of prison admissions for the entire state that were used by the county or counties in the preceding 12 months;

(2) the percentage of the state's violent index crime that occurred in the county or counties in the preceding 12 months;

(3) the percentage of the state's total index crime that occurred in the county or counties in the preceding 12 months;

(4) the percentage of the state's total arrests under the Texas Controlled Substances Act that occurred in the county or counties in the 12 preceding months;

(5) the percentage of the state's population residing in the county or counties; and

(6) the percentage of the state's total unemployment in the county or counties.

Tex.Rev.Civ.Stat.Ann. art. 6166a-4(a).

The statute directs the Board to consider waiving the allocation formula for a county "(1) that experiences a rapid increase in persons convicted of felonies for reasons other than traditional sentencing practices in the county; or (2) in which the jail inmate population exceeds the approved capacity of the county's jail facility, as established by the Commission on Jail

Standards." Tex.Rev.Civ.Stat.Ann. art. 6166a-4(c). Such modifications of the allocation formula are prohibited, however, after November 30, 1990. Tex.Rev.Civ.Stat.Ann. art. 6166a-4(e).

It seems plain that in setting a limit on the number of prisoners each county can transfer to the Institutional Division, the Texas legislature intended that the county remain responsible for detaining those inmates it cannot transfer because it has filled its weekly allocation. To make the state responsible for Institutional Division-ready detainees in excess of a county's allocation would render the allocation process meaningless. Similarly, in the present action, to require the state to pay the cost of detaining Harris County's excess Institutional Division-ready inmates in other county detention facilities would appear to effectively override the allocation the Board of Criminal Justice has established for Harris County in accordance with the statute.

The second development pertinent to the issue at hand, of which I take judicial notice, is the decision in County of Nueces, Texas v. Texas Board of Corrections, et al., No. 452,071 (Dist. Ct. of Travis County, 126th Judicial Dist. of Texas) (Hart, J.). Construing Texas law before the enactment of art. 6166a-4, the court held that the state has a duty to reimburse counties for the costs incurred by detaining inmates who are ready for transfer to the Institutional Division. See partial summary judgments, filed April 18, 1989, and September 9, 1989. In a subsequent ruling, Judge Hart held that the enactment of art. 6166a-4 did not affect his holding in the case. See judgment, filed August 22, 1990. The court's decision currently is on appeal before the Third Judicial District Court of Appeals at Austin. Though not a party to the Nueces action, Harris County has filed an action in the same court seeking the same relief ordered in Nueces. Harris County v. State of Texas, et al., No. 475,468 (Dist. Ct. of Travis County, 126th Judicial Dist. of Texas).

The third matter of importance for the question presented here, of which I also take judicial notice, is the introduction into the Texas House of Representatives of House Bill 13, filed November 12, 1990, which would require the state to reimburse counties for the costs a county incurs by confining inmates who have been sentenced to the Institutional Division. Counties would be repaid not only such costs as they are incurred in the future, but also the amounts expended from September 1, 1989, until the date the act becomes effective. Thus, if enacted in its present form, the Bill would require the state to reimburse Harris County for the costs at issue here.

Perhaps the most important consequence of the introduction of House Bill 13 is that the question presented here will be resolved in the very place it should be decided, the Texas legislature. Its introduction also adds support to the conclusion that Texas law does not at present require the state to pay the cost of detaining a county's Institutional Division-ready prisoners. At the very least, the state's duty to pay such costs is not a settled matter of Texas law.

These three developments, taken together with other considerations, suggest that the proper course for this court is to abstain from deciding whether Texas law requires the state to reimburse Harris County for costs incurred in confining Institutional Division-ready inmates at other county detention facilities. New Orleans Public Serv. v. Council of New Orleans, 109 S.Ct. 2506 (1989), contains recent teaching from the Supreme Court concerning the circumstances in which abstention is proper. After discussing the Court's decisions in Burford v. Sun Oil Co., 319 U.S. 315 (1943) and Alabama Pub. Serv. Comm'n v. Southern R. Co., 341 U.S. 341 (1951), Justice Scalia, writing for seven members of the court, stated:

> From these cases, and others on which they relied, we have distilled the principle now commonly referred to as the "Burford doctrine." Where timely and adequate state review is available, a federal court sitting

> in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar;' or (2) where the 'exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.' Colorado River Water Conservation Dist. v. United States, 424 U.S 800, 814 (1976).

109 U.S. at 2514.

The question presented here falls squarely into the first category in which the New Orleans Court would find Burford-type abstention proper. To require the state to pay the cost of detaining Harris County's excess Institutional Division-ready inmates would "interfere with the proceedings or orders" of the Texas Board of Criminal Justice in establishing Harris County's allocation of transfers to the Institutional Division, in accordance with art. 6166a-4. The issue presents a difficult question of Texas law, and certainly is one that bears on a policy problem of substantial public import whose importance transcends the result in the case at bar, as to the legal point in contention here. The policy problem underlying the cost question presented here is the relative responsibilities of the Institutional Division and the counties for detention of Institutional Division-ready inmates in excess of each county's allocation. While the issue whether the state or Harris County should bear the costs of alternative detention for overflow Harris County prisoners obviously is significant, it is less

important than the underlying policy problem, which has state-wide ramifications.[1]

In several cases, the Supreme Court has endorsed or ordered abstention by the federal district court upon facts similar to those presented here. Kaiser Steel Corp. v. W. S. Ranch Co., 391 U.S. 593 (1968), involved claims concerning water use which turned on the meaning of "public use" under the New Mexico Constitution. The district court decided the claims, and the Court of Appeals rejected a motion to stay the federal court's action until the state law issues could be settled in a declaratory judgment suit then pending in state court. 391 U.S. at 593-94. The Supreme Court reversed, stating:

> The Court of Appeals erred in refusing to stay its hand. The state law issues which is crucial in this case is one of vital concern in the arid State of New Mexico, where water is one of the most valuable natural resources. The issue, moreover, is a truly novel one. The question will eventually have to be resolved by the New Mexico courts, and since a declaratory judgment action is actually pending there, in all likelihood that resolution will be forthcoming soon. Sound judicial administration requires that the parties in this case be given the benefit of the same rule of law which will apply to all other businesses and landowners concerned with the use of this vital state resource.

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[1] The second category of Burford-type abstention to which the New Orleans opinion refers is that where repeated decisions by the lower federal courts concerning a subject matter of public concern would frustrate state efforts to establish a coherent policy with regard to that matter. See Burford v. Sun Oil. Co., supra, 319 U.S. at 326-31. The present action does not precisely fit this category, because actions like the one at bar are not likely to frequently recur. On the other hand, rendering a decision here likely would cause the same type of harm the Burford Court sought to avoid, that is, it would disrupt the state's efforts to establish a coherent, state-wide policy concerning the relationship between the Institutional Division and the county jails.

391 U.S. at 594.

In Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959), as in the case at bar, conflicting indications concerning a question of state law rendered the federal district court unable to determine with confidence how the highest court of the state would decide the issue before it. 360 U.S. at 30. Because the matter, involving the law of eminent domain, was one of substantial public concern, the Court upheld the district court's decision to abstain from deciding the case until the state supreme court had had an opportunity to rule on the question. 360 U.S. at 28-31. In explaining its decision, the Court noted:

> [W]e have held that the mere difficulty of state law does not justify a federal court's relinquishment of jurisdiction in favor of a state court action. Meredith v. Winter Haven, 320 U.S. 228, 236. But where the action touched upon the relationship of City to State, Chicago v. Fieldcrest Dairies, Inc., 316 U.S. 168, . . . we have required District Courts, and not merely sanctioned an exercise of their discretionary power, to stay their proceedings pending the submission of the state law question to state determination.

360 U.S. at 27-28.

In Fieldcrest Dairies, to which the Thibodaux Court refers, a company that marketed milk in the city of Chicago applied for a permit to sell milk in paper containers. Because a city ordinance required milk sold in quantities less than one gallon be delivered in standard milk bottles, the city board of health refused to grant the permit. The company brought an action in the federal district court, seeking a declaratory judgment that the ordinance did not prohibit the sale of milk in paper containers, or, in the alternative, that such a prohibition would be unconstitutional and invalid. During the pendency of the action, the Illinois legislature enacted the statute regulating

the sale of milk, which arguably conflicted with the Chicago city ordinance. 316 U.S. at 169-70.

While the district court and the court of appeals decided the case on the merits, the Supreme Court reversed, holding that the lower courts should have abstained from adjudicating the case. Noting that the Illinois courts and legislature would have the final say as to the meaning of the ordinance in question and as to the alleged conflict between the ordinance and the statute, the Court stated, "The determination which the District Court, the Circuit Court of Appeals, or we, might make could not be anything more than a forecast -- a prediction as to the ultimate decision of the Supreme Court of Illinois." Because the law in question was unsettled, and because "the dispute in its broad reach involves a question as to whether a city has trespassed on the domain of a State," the Court found that

> [t]he delicacy of that issue and an appropriate regard 'for the rightful independence of state governments' re-emphasize that it is a wise and permissible policy for the federal chancellor to stay his hand in absence of an authoritative and controlling determination by the state tribunals. As we said in the Pullman case, 'The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision' and any 'needless friction with state policies.'

316 U.S. at 172 (citations omitted).

The same concerns counsel abstention here.

As noted above, Harris County has instituted in the Travis County district court an action seeking relief which would include recovery of the costs at issue here. Harris County v. State of Texas, et al., No. 475,468 (Dist. Ct. of Travis County, 126th Judicial Dist. of Texas). It is well established that the pendency of a parallel state court action does not in itself require the federal court to abstain. See, e.g., Moore v. Sims,

442 U.S. 415, 423 n.8 (1979). But the prosecution of that action ensures that Harris County will have "timely and adequate state court review" of the cost issue in question here. See New Orleans Public Serv. v. Council of New Orleans, supra, 109 S.Ct. at 2514. Similarly, the introduction of House Bill 13 does not require abstention, but the fact that the Texas legislature apparently will address the question now at bar increases the desirability of abstention by a federal court from deciding the issue.

Both in practical terms and under the provisions of art. 6166a-4, Institutional Division-ready detainees in excess of a county's weekly allocation of transfers to the Institutional Division remain in custody of the county. I am cognizant, then, that to abstain from deciding the cost issue presented here would require, for the present, that Harris County continue to bear the expense of confining those inmates it cannot transfer to the Institutional Division, including any such prisoner the Alberti court orders the County to transfer to other county detention facilities. I would not now hold that Texas law imposes no duty on the state to pay the costs a county incurs in detaining Institutional Division-ready prisoners in excess of a county's weekly allocation. Rather, because I believe that the matter poses a "difficult question[] of state law bearing on policy problems whose importance transcends the result in the case at bar," New Orleans Public Serv. v. Council of New Orleans, supra, 109 S.Ct. at 2514, I would abstain from deciding the issue.

SIGNED this 7th day of February, 1991.

William Wayne Justice
United States District Judge

APPENDIX T

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI; ET AL., Plaintiffs,	§	
VS.	§	CIVIL ACTION
	§	NO. H-72-1094
THE SHERIFF OF HARRIS COUNTY, TEXAS; ET AL.,	§	
Defendants and Third-Party Plaintiffs,	§	
VS.	§	
WILLIAM P. CLEMENTS, JR.; ET AL.,	§	
Third-Party Defendants.	§	

ORDER

On October 24, 1990, the Court directed the parties to meet with the Special Masters in the Alberti and Ruiz cases to develop jointly an acceptable plan for dealing with the current population problem in Harris County detention facilities. This requirement followed motions on the part of both State and County defendants to stay the effect of the Court's September 7, 1990 Order mandating awards of accelerated good time to some convicted felons if the number of prisoners ready for transfer to the Texas Department of Criminal Justice-Institutional Division (Institutional Division) in Harris County detention facilities exceeded 1,350 and release

of some County prisoners in certain defined categories if the population of County prisoners exceeded 4,750.

On November 7, 1990, representatives of State and County agencies and courts with key roles in determining population levels in Harris County detention facilities met with the Special Masters to explore methods of addressing the steady expansion in the number of felons ready for transfer to the Institutional Division.

Participants at that meeting were able to identify a nu;mber of programs, some just implemented, some already in the process of development, and other identified and agreed to for the first time. All are designed to ease overcrowding, and most are designated for convicted felons. It is anticipated that many of the measures discussed can be developed and implemented between November 1 and December 31, 1990, as follows:

1. Expansion of intensive and superintensive supervision probation caseloads: 450 new units to be created by December 31, 1990;

2. Initiation of a contract for drug treatment beds: 50 new beds, available as of November 1, 1990;

3. Expansion of electronic monitoring units for home confinement: 100 new units by December 31, 1990;

4. Dedication of a State-operated boot camp: 200 additional beds, as of December 31, 1990;

5. Possible expansion of electronic monitoring units to be shared by State parole and County probation: 200 new units by December 31, 1990;

6. Reduction of population of Class C misdemeanants: a reduction of 35 misdemeanants by December 31, 1990.

These programs, all at various stages of formation, development and implementation, should provide a total of 1,035 additional sentencing options for district and county judges in Harris County. It is anticipated that the bulk of these options will be introduced into the current sentencing stream primarily as alternatives to the incarceration of felons, an approach that promises to maximize use of the new options as genuine alternatives to TDCJ incarceration.

In addition, the population of Harris County detention facilities is generally lower at year's end, a projected decrease of about 150 inmates this year. It is anticipated that these factors will result in an overall population reduction of 1,185 prisoners by December 31, 1990. This will reduce the current backlog of felons and allow, at the same time, for some limited growth in the felon population due to the continuing and troubling weekly excess of commitments over removals. It will take genuinely cooperative and dedicated efforts on the part of State and County officials to implement all of these programs, however, and their impact on the number of felons committed by Harris County courts to the Institutional Division cannot be predicted with total assurance. Nevertheless, the good faith and creative energy the participants displayed at the November 7, 1990 meeting, as reported to the Court by the Special Masters, augers well for the future.

In addition to the programs already catalogued above, the participants at the November 7, 1990 meeting were able to identify another 1,000 beds or alternative sentencing units scheduled to become available between January 1 and April 30, 1991, including a County-operated boot camp for 385 offenders, 150 additional State-operated intermediate sanction beds, a 190-bed residential treatment facility for probationers,

and 275 additional intensive and superintensive probation supervision slots.

If all of these proposed and developing programs can be implemented and used as genuine alternatives to incarceration, principally of felons in the Institutional Division, the County and State defendants could meet, for the present, the caps imposed by the Court in the September 7, 1990 Order without recourse to the release provisions included in that Order. The Special Masters have recommended that the County and State defendants be given a limited period of time to develop these and possibly other alternative options for reducing the population of Harris County detention facilities to the limits contained in the September 7, 1990 Order. It is therefore,

ORDERED that the County and State defendants be given 60 days from the entry of this Order to implement the programs described above, or others, in order to meet the population caps incorporated in the September 7, 1990 Order. Immediately following that 60 day period, the Alberti Special Master shall report to the Court on the impact of those programs. If the expansion of alternative sentencing options or any other program developed by the County and State defendants does not serve to reduce the population to the mandated levels, the defendants, or either of them, shall be required to contract for the use of private jail cells or empty county jail cells around the State to house excess prisoners.

The Special Masters are directed to continue to work with the defendants to oversee the development of their plans and to assess the actual impact on population of the programs developed to date.

SIGNED this 19th day of November, 1990, at Houston, Texas.

JAMES DeANDA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX U

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, et al.,)		
Plaintiffs,	)	
vs.	)	
JOHNNY KLEVENHAGEN, et al.,	)	C. A.
	)	No. 72-H-1094
Defendants.	)	
vs.	)	
WILLIAM P. CLEMENTS, et al.,	)	
Third-Party Defendants.	)	

ORDER

On April 5, 1990, the Court entered a remedial order in this case that established an immediate cap of 6,700 inmates at the Harris County detention facilities, and caps of 6,400 by May 15, 1990, and 6,100 by August 31, 1990. That order imposed an obligation on the State defendants to take a specific number of prisoners ready for transfer to the Texas Department of Criminal Justice - Institutional Division (TDCJ-ID) and provided that if the State defendants failed to take that number of prisoners, automatic awards of administrative good time would be made to certain carefully limited classes of convicted felons. Likewise, the order provided for releases of certain categories of convicted misdemeanants and pre-trial detainees, commencing with those least likely to present a threat to the public

safety, in the event that the mandated steps by the County defendants failed to reduce the number of prisoners to levels specified in the order.

As a consequence of that order, the number of prisoners held in Harris County detention facilities was substantially reduced, without the necessity of making any awards of administrative good time. On August 13, 1990, the total population of Harris County detention facilities was 6,097, or 30 percent over their design capacity. The number of felons ready for transfer to TDCJ-ID fell from 3,420 on July 31, 1989 to 1,069 on July 31, 1990. The total smaller population, moreover, occupied increased cellspace, because the newly renovated 301 Building opened on December 2, 1989, raising the capacity of Harris County detention facilities by 417 to a new total of 4,698 beds.

On August 14 and 15, 1990, the Court held hearings to review the defendants' progress in meeting the requirements of the April 5, 1990 Order and consider whether and what further remedial actions might be appropriate. The County defendants informed the court that its latest construction project, the so-called 701 Building, a cold storage warehouse in downtown Houston currently being converted into a 4,000-bed jail, and a new central intake center for the processing of all prisoners on entry into Harris County Sheriff's Department, will be ready for occupancy by September 1, 1991. This date is critical in this case because these new facilities will permit the County to handle up to 8,698 prisoners, which, in combination with programs for alternatives to incarceration being developed under House Bill 2335, portends an end to the correctional crisis that has plagued Harris County for over 15 years.

The problem the court must address now is how best to bridge the next 12 months. The Special Master in the Alberti case testified that, while some further population reductions are necessary, the County's institutions could probably be managed safely and securely for a limited period at a population level somewhere between 5,500 and 6,000. The State defendants'

expert witness concurred. The task then is to assure first that the September 1991 target date for the opening of the 701 Building is fixed firmly and irrevocably and, second, to keep the population of Harris County detention facilities within acceptable limits for the next 12 months. Accordingly, the following remedial measures are hereby ordered and directed:

1. The County defendants shall occupy the new 701 Building by no later than September 1, 1991. They shall provide funding for, and begin, the recruitment, hiring and training of staff to operate the 701 Building by no later than September 30, 1990. The County defendants shall be assessed a substantial daily fine for each day beyond September 1, 1991 they fail to occupy the 701 Building. "Occupy" in this context refers to the housing of a substantial number of prisoners, not a token contingent.

2. Upon the entry of this order, the overall population of Harris County detention facilities shall not exceed 6,100 prisoners.

3. The overall population of Harris County detention facilities shall be reduced to 6,000 by December 31, 1990.

4. The population of prisoners ready for transfer from Harris County detention facilities to TDCJ-ID shall not exceed 1,350 between the entry of this order and September 1, 1991. For the purpose of this order, a prisoner ready for transfer to TDCJ-ID is an individual who has been convicted of a felony and sentenced, and whose immediate transfer to TDCJ-ID would be in compliance with section 8 of article 42.09 of the Texas Code of Criminal Procedure.

5. Between the date of the entry of this order and September 1, 1991, the State defendants shall maintain the current allocation formula for admissions to TDCJ-ID pursuant to Tex. Rev. Civ. Stat. Ann. art. 6166a-4. That proportional share

of admissions to TDCJ-ID shall apply to all additional capacity that becomes available during the period covered by this order.

6. The County defendants shall compile and submit to the State defendants every ten days a list of prisoners potentially eligible for parole in absentia (PIA) or pre-parole transfer (PPT) together with the necessary paperwork on each identified prisoner. The County defendants shall be responsible for forwarding the necessary paperwork on eligible prisoners within ten days of their receipt of the requisite paperwork from courts or prosecutors. The State defendants shall take final action on parole within 45 days of receiving notification from all personnel that a prisoner is eligible, together with the receipt of all necessary paperwork. The period of time consumed by the "Notice to Trial Officials" procedures shall not be included in this 45-day time limit. The State defendants shall be required to take final action on prisoners eligible for PPT within 45 days subject to the availability of PPT beds.

7. Whenever the number of prisoners in Harris County detention facilities ready for transfer to TDCJ-ID exceeds 1,350 for 15 consecutive days, awards of administrative good time pursuant to this order shall be made only to those prisoners in Harris County detention facilities ready for transfer TDCJ-ID who have already been identified as eligible for consideration for either PIA or PPT, and whose names and paperwork have been submitted by the County defendants, other than the following: (1) prisoners who are serving a sentence for an offense for which the judgment contains an affirmative finding under Subdivision (2) of Subsection (a) of section 3g, article 42.12, Texas Code of Criminal Procedure; (2) prisoners who are serving a sentence for an offense listed in one of the following sections of the Texas Penal Code: (A) section 19.02 (murder); (B) section 19.03 (capital murder); (C) section 19.04 (voluntary manslaughter); (D) section 20.03 (kidnapping); (E) section 20.04 (aggravated kidnapping); (F) section 21.11 (indecency with a child); (G) section 22.011 (sexual assault); (H) section 22.021 (aggravated sexual assault); (I) section 22.03 (deadly

assault on law enforcement or corrections officer or court participant); (J) section 22.04 (injury to child or an elderly individual); (K) section 25.02 (incest); (L) section 25.06 (solicitation of a child); (M) section 25.11 (sale or purchase of a child); (N) section 28.02 (arson); (O) section 29.02 (robbery); (P) section 29.03 (aggravated robbery); (Q) section 30.02 (burglary), if the offense is punished as a first degree felony under that section; (R) section 43.04 (aggravated promotion of prostitution); (S) section 43.05 (compelling prostitution); (T) section 43.24 (sale, distribution, or display of harmful material to minor); (U) section 43.25 (sexual performance by a child); (V) section 46.11 (deadly weapon in penal institution); (W) section 15.01 (criminal attempt), if the offense attempted is listed in this paragraph; (X) section 15.02 (criminal conspiracy), if the offense that is the subject of this conspiracy is listed in this paragraph; or (Y) section 15.03 (criminal solicitation), if the offense solicited is listed in this paragraph; and (3) prisoners who are serving a sentencing for an offense listed in section 4.03(c) or 4.032(c) (aggravated manufacture or delivery of a controlled substance), section 4.04(c), 4.041(c), 4.042(c), or 4.043(c) (aggravated possession of a controlled substance), section 4.05 (delivery of marijuana) if the offense is punished under Subsection (b)(5) of that section, section 4.05(c) (aggravated delivery of marijuana), or section 4.051(c) (aggravated possession of marijuana) of the Texas Controlled Substance Act (article 4476-15, Vernon's Texas Civil Statutes).

In the event that awards of administrative good time are required to achieve the limit on the number of prisoners ready for transfer to TDCJ-ID in Harris County detention facilities, sufficient administrative good time shall be awarded to eligible prisoners to reduce the number of such prisoners to 1,350 within a reasonable time. If the initial award of administrative good time does not suffice to reduce the number of prisoners awaiting transfer to TDCJ-ID to 1,350 within a reasonable time, additional increments of administrative good time shall continue to be awarded to all eligible prisoners until the required cap has been reached. The Alberti Special Master shall apprise

the court if awards of administrative good time are required by this paragraph and shall recommend the number of days to be awarded. Any awards shall be ordered by the Alberti court. The State and County defendants shall cooperate to develop an orderly process for the identification of prisoners eligible for additional good time and provide that information to the Special Master. The State and County defendants shall not be in contempt of this order if, despite compliance with all aspects of this order, the acceleration of administrative good time as directed in this paragraph fails to achieve the required cap.

8. The population of prisoners in Harris County detention facilities, exclusive of those ready for transfer to TDCJ-ID, shall not exceed 4,750 between the entry of this order and December 31, 1990, or 4,650 between January 1 and September 1, 1991.

9. The County defendants may utilize expanded use of release on recognizance and their pre-trial services agency, extensive use of electronic monitoring and drug testing programs for pre-trial detainees, or the implementation of alternative community corrections programs pursuant to the provisions of House Bill 2335 to remove county prisoners from Harris County detention facilities and ameliorate overcrowded conditions.

10. Whenever the population of Harris County detention facilities, exclusive of prisoners ready for transfer to TDCJ-ID, exceeds 4,750 between the entry of this order and December 31, 1990 or 4,650 between January 1 and September 1, 1991 for 15 consecutive days, the Alberti Special Master shall make sufficient releases to meet the then-applicable cap. In making releases, the Special Master shall operate, first, to reduce any potentialy adverse impact of such releases on public safety and, second, to maximize the impact of releases on actual population reductions. Releases shall be made in order of those least likely to create danger to the community in the opinion of the Special Master, and choices among the categories of those

released will be based on the impact of projected releases on the actual population. Among the categories of County prisoners the Special Master shall consider for release are misdemeanant pre-trial detainees who are not charged with a felony; pre-trial detainees charged with a third degree felony who have scored six or seven points on their pre-trial services interview and are not charged with another felony; Class C misdemeanants held in lieu of the payment of court costs/fines; Class A and B misdemeanants serving court costs/fines; and parole violators arrested on a so-called "Blue Warrant" for the technical violation of parole conditions rather than a new criminal charge. In addition, if necessary to meet the cap, the Special Master may award sufficient increments of daily good time to convicted Class A and B misdemeanants to accomplish the needed releases. The County defendants shall cooperate fully with the Special Master in the conduct of all such releases and provide whatever logistical support he may need to carry out his duties pursuant to this provision. The County defendants shall not be in contempt of this order if, despite compliance with all aspects of this order, through the releases and acceleration of good time directed in this paragraph, the caps required by this order are not achieved.

11. The State and County defendants shall cooperate to implement as quickly as possible a plan, pursuant to the provisions of House Bill 2335, designed to reduce the population of the Harris County detention facilities in order to minimize the need for awards of good time and early releases of prisoners. To this end, all provisions of paragraph 6 of the court's order of April 5, 1990 shall continue in full force and effect.

12. Based on information to be provided by the Alberti Special Master, the court will review on a quarterly basis the actions taken pursuant to this order and the impact of those actions on the level of population in the Harris County detention facilities to determine whether this order is having its intended effect and whether any modification is required.

13. The court specifically retains jurisdiction over this matter.

Done in Houston, Texas this 6th day of September, 1990.

James DeAnda
Chief Judge
United States District Court
Southern District of Texas

William Wayne Justice
United States District Judge
United States District Court
Eastern District of Texas
Sitting by Designation

APPENDIX V

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, et al.,	)	
Plaintiffs,	)	
v.	)	
THE SHERIFF OF HARRIS COUNTY, et al.,	)	
Defendants/Third-Party Plaintiffs,	)	C. A. No. 72-H-1094
v.	)	
WILLIAM P. CLEMENTS, et al.,	)	
Third-Party Defendants.	)	

ORDER

On September 25, 1989, the court entered Findings of Fact and Conclusions of Law relating to the unconstitutionality of conditions in Harris County detention facilities and the liability of the State and Count defendants for such conditions. After lengthy negotiations among the parties over proposed remedies for dealing with overcrowding and unconstitutional conditions, the subsequent submission by the parties of remedial plans and a lengthy hearing on the propose remedial plans conducted before the undersigned judges, a remedial

order was entered on March 15, 1990. Since that date, the parties have filed motions that have brought to our attention the need to clarify certain provisions in that order and, in one minor respect, to modify the prior order. It should be emphasized that these clarifications and the minor modification in no manner depart from the intent of the court when it entered its March 15 order. In order to avoid misunderstanding, the order of March 15, 1990 will be vacated and this order will be entered in its place, nunc pro tunc. Accordingly, the following remedial measures are hereby ordered and directed:

1. Upon the entry of this order, the overall population of Harris County detention facilities shall not exceed 6,700 prisoners.

2. The overall population of Harris County detention facilities shall be reduced to 6,400 prisoners by May 15, 1990, and shall be reduced to 6,100 prisoners by August 31, 1990. These objectives shall be achieved by actions of the State defendants and the County defendants, as set forth below.

3. Between February 1, 1990 and August 31, 1990, the State defendants shall cause at least 9,130 prisoners ready for transfer from Harris County detention facilities to the Institutional Division of the Texas Department of Criminal Justice (formerly the Texas Department of Corrections, and referred to hereafter as "the Institutional Division"), as defined below, to be removed from the Harris County detention facilities.

4. For the purpose of this order, a prisoner ready for transfer to the Institutional Division is an individual who has been convicted of a felony and sentenced, and whose immediate transfer to the Institutional Division would be in compliance with section 8 of article 42.09 of the Texas Code of Criminal Procedure.

5. The County defendants shall compile and submit to the State defendants every ten days a list of prisoners potenti-

ally eligible for parole in absentia (PIA) or pre-parole transfer (PPT), together with the necessary paperwork on each identified prisoner. The County defendants shall be responsible for forwarding the necessary paperwork on eligible prisoners within ten days of their receipt of the requisite paperwork from the courts or prosecutors.

The State defendants shall take final action on parole within 45 days of receiving notification from all personnel that a prisoner is eligible, together with the receipt of all necessary paperwork. The period of time consumed by the "Notice to Trial Officials" procedures shall not be included in this 45-day time limit. The State defendants shall be required to take final action on prisoners eligible for PPT within 45 days, subject to the availability of PPT beds.

6. The County defendants have submitted a plan, pursuant to the provisions of House Bill 2335, portions of which propose alternative facilities and programs for convicted felons traditionally transferred to the Institutional Division who are, or will be, kept in Harris County. The County defendants' plan shall be reviewed expeditiously by appropriate State officials. If approved, the State defendants shall immediately take all steps that are necessary and within their authority to provide funding to the County for the implementation of the plan, through a request for budget executions or other means. The State defendants will not be obligated, however, to provide funding for such purpose in excess of the monetary limits established pursuant to Tex. Rev. Civ. Stat. Ann. art. 6166a-4, and in determining whether any advance of funds is required pursuant to a budget execution, the State defendants may take into account the ability of the County defendants to fulfill their obligations under the plan during the period for which any accelerated funding may be requested.

7. During the period covered by this order, the State defendants shall maintain the current allocation formula for admissions to the Institutional Division as adopted by the

Board of Criminal Justice on January 29, 1990 pursuant to Tex. Rev. Civ. Stat. Ann. art. 6166a-4. That proportional share of admissions to the Institutional Division shall remain constant with respect to both current Institutional Division facilities and such Institutional Division facilities as may come on line and be ready for occupancy by prisoners during the period covered by this order.

8. On May 31, 1990, the Sheriff of Harris County shall notify the court of the number of prisoners ready for transfer to the Institutional Division who were removed by the State defendants from the Harris County detention facilities between February 1 and May 31, 1990. On August 31, 1990, the Sheriff of Harris County shall notify the court of the number of prisoners ready for transfer to the Institutional Division who were removed by the State defendants from the Harris County detention facilities between June 1 and August 31. If the State defendants have not removed 4,565 prisoners from the Harris County detention facilities between February 1 and May 31, 1990, or a total of 9,130 prisoners from the Harris County detention facilities by August 31, 1990, awards of administrative good time pursuant to this order shall be made to prisoners in Harris County detention facilities ready for transfer to the Institutional Division who have been identified already as eligible for consideration for either PIA or PPT, and whose names and paperwork have been submitted by the County defendants, other than the following: (1) prisoners who are serving a sentence for an offense for which the judgment contains an affirmative finding under Subdivision (2) of Subsection (a) of section 3g, article 42.12, Texas Code of Criminal Procedure; (2) prisoners who are serving a sentence for an offense listed in one of the following sections of the Texas Penal Code: (A) section 19.02 (murder); (B) section 19.03 (capital murder); (C) section 19.04 (voluntary manslaughter); (D) section 20.03 (kidnapping); (E) section 20.04 (aggravated kidnapping); (F) section 21.11 (indecency with a child); (G) section 22.01 (sexual assault); (H) section 22.021 (aggravated sexual assault); (I) section 22.03 (deadly

assault on law enforcement or corrections officer or court participant); (J) section 22.04 (injury to child or an elderly individual); (K) section 25.02 (incest); (L) section 25.06 (sale or purchase of a child); (M) section 25.06 (solicitation of a child); (N) section 28.02 (arson); (O) section 29.02 (robbery); (P) section 29.03 (aggravated robbery); (Q) section 30.02 (burglary), if the offense is punished as a first degree felony under that section; (R) section 43.04 (aggravated promotion of prostitution); (S) section 40.05 (compelling prostitution); (T) section 40.24 (sale, distribution, or display of harmful material to minor); (U) section 43.25 (sexual performance by a child); (V) section 46.11 (deadly weapon in penal institution); (W) section 15.01 (criminal attempt), if the offense attempted is listed in this paragraph; (X) section 15.02 (criminal conspiracy), if the offense that is the subject of this conspiracy is listed in this paragraph; or (Y) section 15.30 (criminal solicitation), if the offense solicited is listed in this paragraph; and (3) prisoners who are serving a sentence for an offense listed in section 4.03(c) or 4.032(c) (aggravated manufacture or delivery of a controlled substance), section 4.04(c), 4.041(c), 4.042(c), or 4.043 (c) (aggravated possession of a controlled substance), section 4.05 (delivery of marijuana) if the offense is punished under Subsection (b)(5) of that section, section 4.05(c) (aggravated delivery of marijuana), or section 4.051(c) (aggravated possession of marijuana) of the Texas Controlled Substance Act (article 4476-15, Vernon's Texas Civil Statutes).

In the event that awards of extra administrative good time are required to achieve the removals required of the State defendants, 30 days of administrative good time shall be made to eligible prisoners. If the initial award of 30 days of administrative good time does not suffice to produce the required number of removals, 30-day increments of administrative good conduct time shall continue to be awarded to all eligible prisoners until the number of required removals has been accomplished. The State defendants shall not be in contempt of this order if, despite compliance with all aspects of this order, the acceleration of administrative good time as

directed in this paragraph fails to produce a sufficient number of prisoners eligible for release through PIA or PPT to accomplish the number of required removals. The Special Master in this case shall apprise the court if any awards of administrative good time are required by this paragraph, in which event such awards shall be ordered by the Alberti court upon recommendation of the Special Master. The State and County defendants shall cooperate to develop an orderly process for the identification of prisoners eligible for additional good time and provide that information to the Special Master.

9. Not later than ten days following the entry of this order, the Sheriff of Harris County shall file a report with the court setting forth the total number of inmates in Harris County detention facilities, who are not ready for transfer to the Institutional Division, as of the date of entry of this order. This number shall include pre-trial detainees, county prisoners, Class C misdemeanants, parole violators, bench-warrant prisoners, fugitives, civil district court detainees, federal prisoners, immigration prisoners, inmates convicted and sentenced to less than ten years whose cases are on appeal under authority of Tex. Code Crim. Pro Ann. art. §42.09, §4 and convicted and sentenced inmates with multiple indictments whose trials are not completed.

10. Commencing on the date of this order, the County defendants shall ensure that the population of inmates in Harris County detention facilities, who are not ready for transfer to the institutional Division, is maintained at a level that will permit the achievement of the objectives of paragraph 2 of this order. The County defendants may meet this obligation through a variety of self-initiated means, including, for example, an expedited, critical review of their present pre-trial detainee population, in conjunction with the County and State judiciary, to remove detainees determined to be eligible for release on personal bond; the introduction and use of the electronic monitoring and drug testing programs for pre-trial detainees; implementation of community corrections programs

pursuant to the provisions of House Bill 2335; or any other feasible and appropriate measures.

11. On May 31 and August 31, 1990, the Sheriff of Harris County shall notify the court of the total number of inmates in Harris County detention facilities. If, despite the adoption of the voluntary measures described in paragraph 10, above, the total number of inmates exceeds 6,400 on May 15 despite the State defendants' compliance with paragraphs 3, 5, and 8 of this order, or the total number of inmates exceeds 6,100 on August 31 despite the State defendants' compliance with paragraphs 3, 5, and 8 of this order, the Alberti Fact-Finding Master shall release misdemeanor pre-trial detainees, first releasing those charged with the lowest category of offense, provided that no misdemeanor detainee shall be released who is also charged with a felony. If the mandated population reduction requires the release of one or more pre-trial detainees charged with a particular category of offense, all of the eligible members in that category shall be released. If the release of misdemeanor pre-trial detainees does not suffice to produce the required reduction, the Fact-Finding Special Master shall next release pre-trial detainees charged with a third degree felony who score a six or seven on their pre-trial services interview, and who are not also charged with another felony offense. If the release of misdemeanor and third degree felony pre-trial detainees does not suffice to produce the required reduction in population, the Fact-Finding Special Master shall release Class C misdemeanants held in lieu of the payment of court costs/fines. Releases within this category shall be based on the amount of the costs/fines to be served, with those having the least costs/fines to serve being released first. If meeting the mandated reduction requires the release of one or more offenders in a particular category, all of the eligible members in that category shall be released. Thus if two releases are required to meet the quota, but there are six incarcerated misdemeanants serving only one day in lie of costs/fines, all six are to be released. If the release of Class C misdemeanants serving costs/fines does not suffice to produce the required reduction,

the Fact-Finding Special Master shall release Class A and B misdemeanants serving court costs/fines. Releases in this category, again, shall be based on the amount of the costs or fines to be served, with those having the least costs or fines being released first. If the release of Class C misdemeanants serving fines and Class A and B misdemeanants serving costs/fines does not suffice to produce the required reduction, the Fact-Finding Special Master shall award sufficient increments of daily administrative good time to Class A and B misdemeanants serving County time to accomplish the number of releases required. If more than the number of inmates needed to meet the required reduction are eligible for release based on the award of a specific amount of good time, all inmates made eligible by the award of good time shall be released. The Fact-Finding Special Master shall continue to award daily increments of administrative good time to prisoners serving County time and make releases in the order prescribed above until the number of inmates in Harris County detention facilities reaches the levels required by paragraph 2 of this order to be accomplished by May 15 and August 31. In directing the foregoing releases, the Fact-Finding Special Master shall operate with a view to reducing the potentially adverse impact of such releases on public safety; releases shall be made in order of those least likely to create a danger to the community in the opinion of the Special Master. The County defendants shall not be liable for proceedings in contempt of this order if, despite compliance with all aspects of this order, through the acceleration of good time and releases directed in this paragraph, an insufficient number of prisoners is identified and released to meet the reductions mandated by this order.

12. The court specifically retains jurisdiction over this matter.

IT IS HEREBY ORDERED that the court's order of March 15, 1990, be and hereby is vacated.

DONE in Houston, Texas this 5th day of April 1990, nunc pro tunc March 15, 1990.

James DeAnda
Chief Judge
United States District Court
Southern District of Texas

William Wayne Justice
United States District Judge
Eastern District of Texas
Sitting by Designation

APPENDIX W

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI; ET AL.	§	
	§	
VS.	§	CIVIL ACTION
	§	NO. H-72-1094
THE SHERIFF OF HARRIS COUNTY, TEXAS; ET AL.	§	
	§	
VS.	§	
WILLIAM P. CLEMENTS; ET AL.	§	

ORDER

The Court ORDERS that County Defendants' motion to amend or supplement the findings and conclusions entered September 25, 1989, or, in the alternative for a new trial is DENIED.

SIGNED in Houston, Texas, this 23rd day of October, 1989.

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JAMES DeANDA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX X

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI; ET AL..	§	
	§	
VS.	§	CIVIL ACTION
	§	NO. H-72-1094
JOHNNY KLEVENHAGEN; ET AL.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case presents a triad of pending matters aimed at vindicating the rights of inmates presently incarcerated in the Harris County Jail facilities. First, Plaintiffs have filed series of motions[1] requesting supplemental relief against the Sheriff of Harris County and the Harris County Commissioners Court (County Defendants). Second, County Defendants have filed a third-party action against various state officials (State

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[1] Plaintiffs' pending motions are: (1) Plaintiffs' motion to modify the Courts' November 8, 1988 Order, or, in the alternative, for an additional interim order (filed January 11, 1989); (2) Plaintiffs' motion for supplemental relief establishing population limits on the Harris County detention facilities (filed February 17, 1989); (3) Plaintiffs' motion for additional supplemental relief establishing population limits on the Harris County detention facilities (filed May 30, 1989); (4) Plaintiffs' motion for additional supplemental relief requesting additional jail staff assistants for the monitors, and good time credits (filed May 30, 1989); and (5) Plaintiffs' motion for a temporary restraining order and prelimiinary injunction (filed September 11, 1989).

Defendants)[2] alleging that the state officials are liable to them for all or part of Plaintiffs' claims against the county relating to conditions of confinement in the Harris County Jail. In particular, County Defendants claim that the State Defendants' refusal to accept all convicted felons ready for transfer into the Texas Department of Corrections (TDC) is the primary cause of unconstitutional conditions of confinement in the Harris County Jail. Third, in response to the Court's suggestion, Plaintiffs have filed a motion for leave to file a supplemental complaint against the State Defendants already joined as third-party defendants by County Defendants.[3]

Trial to the bench on County Defendants' third-party complaint commenced on August 14, 1989 and concluded on August 18, 1989. At the conclusion of evidence, the Court took the matter under advisement and requested post-trial briefs on certain issues. The Court subsequently held a hearing on Plaintiffs' request for supplemental relief from September 12, 1989 through September 15, 1989. Now, after reviewing the record, the testimony and credibility of the witnesses, and the applicable law, the Court concludes, as is more fully set forth in the findings of fact and conclusions of law below, that State Defendants and County Defendants are liable for the

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[2] State Defendants are the following state officials who control the admissions policy and population levels of the Texas Department of Corrections (TDC): William P. Clements, Governor of the State of Texas; James Lynaugh, Director of TDC; Charles T. Terrell, Chairman of the Texas Board of Corrections; and deralyn R. Davis, Joseph V. Lamantia, Allan Bruce Polunsky, James M. Eller, F. L. "Steve" Stephens, Dennis R. Hendrix, Robert Mann, and Jerry H. Hodges, Board Members on the Texas Board of Corrections.

[3] Actually, Plaintiffs seek to join several additional state officials who were not previously joined as third-party defendants by County Defendants. The additional state officials include the board members of the Texas Board of Pardons and Paroles as well as two baord members of the new Texas Board of Criminal Justice who were not included in County Defendants' list of the members of the previous Texas Board of Corrections. Moreover, Plaintiffs have attempted to name the State of Texas as a defendant. The list of state officials Plaintiffs seek to join presents problems that the Court will more fully address below.

unconstitutional conditions of confinement presently existing in the Harris County Jail facilities.

PROCEDURAL HISTORY

On August 14, 1972, Lawrence R. Alberti and others filed a class action against County Defendants pursuant to 42 U.S.C. § 1983 claiming that conditions of confinement in the Harris County Jail facilities violated their statutory and constitutional rights. Two and a half years later, in February of 1975, the parties agreed to, and this Court entered, a consent judgment. The consent judgment required County Defendants, inter alia, to provide sufficient funds to increase jail capacity, to provide sufficient guards to assure safety without relying on inmate assistants, and to provide adequate medical, dental, and rehabilitative services to the inmates. The Court retained exclusive jurisdiction to issue interim orders necessary for relief in the action.

Not long after the February, 1975 consent decree was entered, Plaintiffs filed a motion for supplemental relief alleging: that County Defendants had failed to implement a viable pre-trial release program, and that the amount of financing committed to the construction of new facilities was wholly inadequate. After conducting a six-day evidentiary hearing on Plaintiffs' motion and touring the jail facilities, the Court issued a lengthy and detailed supplemental remedial order. See Alberti v. Sheriff of Harris County, 406 F.Supp. 649 (S.D. Tex. 1975).

Ultimately, the Court approved County Defendants' plans for the construction of a new central jail and a staffing plan that required County Defendants to provide at least one guard per forty-five inmates at the new facility. In August of 1983, Plaintiffs filed a motion for contempt, alleging that County Defendants had never succeeded in complying with the staffing order. After conducting a lengthy evidentiary hearing, the Court found the conditions existing within the jail to be

unconstitutional and entered yet another supplemental remedial order regarding minimum staffing levels at the jail facilities. See Alberti v. Sheriff of Harris County, 600 F.Supp. 443 (S.D. Tex. 1984), aff'd 790 F.2d 1220 (5th Cir. 1986).

After the Court appointed special masters in 1987 to monitor County Defendants' compliance with the Court's remedial orders, it appeared that a spirit of cooperation between Plaintiffs and County Defendants would eventually lead to full compliance with all Court orders with a minimum of direct judicial intervention. However, during 1988, TDC's refusal to accept all convicted felons ready for transfer from the jail prevented County Defendants from fully complying with this Court's orders.

By early November of 1988, the overcrowded conditions in the jail facilities had reached crisis proportions. After considerable negotiations among Plaintiffs, the Special Master, and County Defendants, the parties presented a proposed order to the Court at a November 4, 1988 hearing[4] that would require the Sheriff to transport to TDC each week at least 250 male and 40 female convicted felons who were ready for transfer. Three days later, Plaintiffs filed an unopposed motion for interim emergency relief that requested the entry of the proposed order discussed at the November 4 hearing. On November 8, 1988, the Court signed the requested order.[5]

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[4] The November 4 hearing had been previously set to consider the more mundane problem of establishing a budet for the Special Master. The Court recieved notice that the parties wanted to discuss the entry of the proposed order only one day prior to the hearing.

[5] In its August 11, 1989 opinion on State Defendants' petition for a writ of mandamus, the Court of Appeals incorrectly, yet understandably, concluded that this Court entered the November 8, 1988 Order sua sponte. See, In re: William P. Clements, No. 89-2706, Slip Opinion at p. 5 (5th Cir. 1989). In fact, the unopposed motion for interim emergency relief (instrument number 896 in file). Although Plaintiffs' motion was received by the Clerk's Office on November 7, 1988 (as indicated by a stamp on the

(footnote continued on next page)

Despite the Court's November 8, 1988 order, TDC refused to accept any convicted felons beyond the 182 felons it agreed to accept each week according to its "scheduled admissions policy." Without TDC's cooperation, the Sheriff was unable to comply with the Court's November 8, 1988 order. Therefore, on December 12, 1988, County Defendants filed a motion to stay the November 8, 1988 order and a motion asking the Court to require Plaintiffs to join the appropriate TDC officials as defendants pursuant to Fed. R. Civ. P. 19(a) and 21. Plaintiffs opposed County Defendants' motion to stay, and, although Plaintiffs agreed that TDC officials should be joined as parties, they had no desire to amend their complaint to add TDC officials as defendants.[6] Instead, Plaintiffs sought to have the noncooperating TDC officials held in contempt for interfering with the Sheriff's ability to comply with the November 8, 1988 order.

After conducting a conference on January 12, 1989, the Court granted the Sheriff's motion to stay the November 8, 1988 order, denied Plaintiffs' suggestion of contempt, [7] and denied County Defendants' motion to require Plaintiffs to join TDC officials as defendants. However, the Court granted County Defendants leave to join the appropriate

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(footnote continued from previous page)
reverse side of the last page of the proposed order that was attached as an exhibit to the motion), through clerical error, the motion was not "filed" until December 7, 1988.

[6] Plaintiffs argued that if TDC officials were to be joined, County Defendants hould join them as third-party defendants pursuant to Fed. R. Civ. P. 14(a).

[7] Contempt proceedings would have been an ill-suited method of determining whether TDC had any duty to accept felons pursuant to the Court's November 8, 1988 order. Moreover, the Court was concerned that contempt proceedings would have been premature because at that time there had not yet been a finding that the then existing conditions of confinement in the Harris County Jail facilities were unconstitutional. See, Benjamin v. Malcolm, 803 F.2d 46, n.6 (2d Cir. 1986), cert. denied sub. nom. Cuomo v. Koehler, 480 U.S. 910 (1987). (distinguishing Badgley v. Veralas, 729 F.2d 894 (2d Cir. 1984)).

state officials as third-party defendants pursuant to Fed. R. Civ. P. 14(a).

County Defendants filed their third-party complaint against State Defendants on January 20, 1989. State Defendants responded with a series of motions to dismiss, to transfer venue, to join additional parties, to stay proceedings, and to abstain from exercising jurisdiction. On May 12, 1989, after receiving extensive briefs, the Court denied all of State Defendants' motions.

On June 9, 1989, the Court entered an order that recognized the unusual procedural posture of this case and sought to establish an expeditious, yet procedurally fair, manner of resolving the issues raised in County Defendants' third-party complaint. Because the facts relevant to a determination of the appropriate relief County Defendants were entitled to by their third-party complaint appeared to be fully developed by the Special Master's June 2, 1989 Final Findings, the Court sua sponte moved for summary judgment in favor of County Defendants.[8] The Court indicated that if either party filed timely sworn objections to any of the Special Master's findings, the Court would proceed by holding a plenary evidentiary trial to the bench on August 14, 1989. Because both parties

[8] State Defendants objected to the Court's sua sponte motion for summary judgment, claiming that it not only violated Fed. R. Civ. P. 56, but that it was "fundamentallyu unfair under traditional notions of due process." See State Defendant's cross motion for summary judgment and response to Court's order of June 9, 1989 (instrument number 992 in file) at 3, n. 2. However, both the United States Supreme Court and the Fifth Circuit Court of Appeals have recognized that a district court may sua sponte grant summary judgment when the parties have been given adequate time for discovery and adeequate notice that they must come forward with all their evidence. See Celotex Corporation v. Catreett, 477 U.S. 317, 326 (1986); Page v. DeLaune, 837 F.2d 233, 238 (5th Cir. 1988). This case appeared to be well suited for disposition on summary judgment because the factual accuracy of the Special Master's findings could hardly be doubted. At the subsequent trial on County Defendants' third-party complaint, State Defendants offered no meaningful challenge to the accuracy of the Special Master's findings.

subsequently filed objections to the Special Master's June 2, 1989 findings, the Court's sua sponte motion for summary judgment became moot.

On May 30, 1989, Plaintiffs filed a motion asking the Court to transfer consideration of their requests for supplemental relief to the Honorable William Wayne Justice, the presiding judge in Ruiz v. Estelle, C.A. No. H-78-987 (S.D. Tex.). State Defendants responded to Plaintiffs' motion by urging a transfer of proceedings on County Defendants' third-party complaint; however, State Defendants objected to the transfer of Plaintiffs' pending motions. On June 29, 1989, State Defendants also filed a motion asking the Court to reconsider its May 12, 1989 Memorandum and Order denying their various motions to dismiss in light of the recent passage and acceptance of H.B. 2335.[9] By an order entered July 11, 1989, the Court denied Plaintiffs' motion to transfer proceedings and State Defendants' motion to reconsider.[10] Shortly thereafter, State Defendants filed an application for a writ of mandamus with the Fifth Circuit Court of Appeals asking the Court of Appeals to order this Court to transfer consideration of County Defendants' third-party complaint to the Ruiz court.

On August 11, 1989, the Friday preceding the trial scheduled for Monday, August 14, 1989, the Fifth Circuit Court of Appeals entered an order granting in part and denying in part State Defendants' petition for a writ of mandamus.[11] In essence the Court of Appeals allowed this Court to proceed with the August 14, 1989 trial to determine the merits of County

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[9] Acts 1989, 71st Leg., Ch. 785.

[10] In response to Plaintiffs' request for clarification, the Court also gave notice to the parties in its July 11, 1989 order that it would permit Plaintiffs to present evidence relevant to their pending motions for relief against County Defendants at the August 14, 1989 trial. Allowing Plaintiffs to participate in the August 14, 1989 trial quickly created problems the Court did not anticipate in its July 11, 1989 order. Thus, 24 days later, on August 4, 1989, the Court informed the parties that it would not hear evidence on Plaintiffs' pending motions at the August 14, 1989 trial.

[11] In re: William P. Clements, et al., No. 89-2706 (5th Cir. 1989).

Defendants' claims against State Defendants. However, in the event this Court found State Defendants liable to County Defendants, it was directed to transfer proceedings on the third-party complaint to Judge Justice for a determination of appropriate relief as to the State Defendants. Accordingly, the Court conducted the trial on County Defendants' third-party complaint in compliance with the Court of Appeals' directive. Thereafter, the Court concluded that it would be helpful to hear evidence on Plaintiffs' pending requests for relief. Thus, beginning September 12, 1989, the Court conducted a four-day hearing on Plaintiffs' pending motions. The Court allowed State Defendants to participate fully at the September 12 hearing and announced that it intended to consider all matters on a consolidated basis.

ALIGNMENT OF THE PARTIES

After taking County Defendants' third-party complaint under advisement, the Court became concerned that the original joinder of State Defendants may have been technically defective. as indicated above, the Court originally denied County Defendants' motion seeking to force Plaintiffs to join State Defendants pursuant to Fed. R. civ. P. 19(a) and 21. Instead, Plaintiffs persuaded the Court that it would be more appropriate to join State Defendants as third-party defendants pursuant to Fed. R. Civ. P. 14(a). Moreover, under virtually identical circumstances, the Sixth and Second Circuit Courts of Appeals have held that joinder of State Defendants as third-party defendants is appropriate.[12] See Benjamin v. Malcolm, 803 F.2d 46 (2d Cir. 1986), cert. denied sub. nom. Cuomo v.

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[12] Tate v. Frey explicitly relied on Rule 14(a) as justifying the joinder of state officials by county officials. See Tate, 735 F.2d at 988-89. In Benjamin v. Malcolm, the Court of Appeals affirmed the district court's joinder of state officials as third-party defendants. However, the city defendants in Benjamin relied on Rules 19, 20 and 21 to justify joining state officials as third-party defendants. See Benjamin, 803 F.2d at 50; see also Benjamin v. Malcolm, 629 F.Supp. 713 (S.D. N.Y. 1986).

Koehler, 480 U.S. 910 (1987); Tate v. Frey, 735 F.2d 986 (6th Cir. 1984).

Nevertheless, County Defendants' joinder of State Defendants as third-party defendants pursuant to Rule 14(a) may have presented a serious jurisdictional problem under Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984). The Court expresses this concern at the hearing on Plaintiffs' requests for supplemental relief. In response to the Court's suggestion that an amended complaint would be appropriate, Plaintiffs filed a motion for leave to file a supplemental complaint naming various state officials as defendants pursuant to Fed. R. Civ. P. 15(d) and 19(a). The Court will grant Plaintiffs' motion for leave to file a supplemental complaint because the Court concludes that Plaintiffs' joinder of State Defendants pursuant to Rule 19(a) provides a more secure jurisdictional basis for relief than County Defendants' third-party complaint pursuant to Rule 14(a).

In its may 12, 1989 Memorandum and Order, the Court recognized that it had no jurisdiction to order State Defendants to obey state law.[13] However, the Court noted that this well recognized principle does not bar it from ordering State Defendants to conform their conduct to federal constitutional standards.[14] By way of explanation, the Court wrote:

> In the present case, [State Defendants] have two distinct duties: First, [State Defendants] have a state-imposed duty to "speedily" accept convicted felons into TDC. Tex. Rev. Civ. Stat. Ann. art. 6166r (Vernon 1970). Second, [State Defendants] have a federal constitutional duty to not impose cruel

[13] May 12, 1989 Memorandum and Order at 8.

[14] May 12, 1989 Memorandum and Order at 8.

> and unusual punishment upon persons convicted of a felony in this state. If [State Defendants] have merely failed to "speedily" accept convicted felons into TDC as required by Tex. Rev. Civ. Stat. Ann. art. 6166r (Vernon 1970), this Court is powerless to compel compliance. However, if [State Defendants] are directly responsible for the cruel and unusual punishment of convicted felons, this Court certainly has the authority to compel compliance with constitutional standards [footnotes and citations omitted].

May 12, 1989 Memorandum and Order at 8-9.

The Court believes that the passage quoted above accurately describes the "distinct duties" owned by State Defendants.[15] However, the cited passage failed to recognize explicitly that the "first distinct duty" owed by State Defendants is owed to County Defendants, whereas the "second distinct duty" owed by State Defendants is owed to the inmates at the Harris County Jail facilities, or the Plaintiff Class. The "second distinct duty," the duty to not impose cruel and unusual punishment, is the only federal duty this Court has the power to enforce.

The problem created by State Defendants' joinder as third-party defendants pursuant to Rule 14(a) becomes apparent once one recognizes that State Defendants' duty to not impose cruel and unusual punishment is owed to Plaintiffs, not to County Defendants. Rule 14(a) provides in relevant part:

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[15] Of course, State Defendants' state-law duty to "speedily" accept inmates was modified by H.B. 2335. Nevertheless, State Defendants' duties toward the County Defendants appear to remain grounded in state law.

> At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. . . .

Prior to 1948, Rule 14(a) permitted a defending party to join as a third-party defendant any person not a party to the action "who is or may be liable to the third-party plaintiff or to the plaintiff." (Emphasis added). However, because the courts had held that a plaintiff could not be compelled to amend his complaint to state a claim against an additional party if he did not wish to do so, [16] the phrase "or to the plaintiff" was deleted from Rule 14(a) in 1948.[17] Thus, Rule 14(a), as amended, only allows a defendant to implead a third-party defendant if applicable law renders the third-party defendant liable to the defendant for some or all of the plaintiff's claims against the defendant. See Wright & Miller, Federal Practice and Procedure: Civil, § 1446 at 258 (West 1971). in this case, joinder of State Defendants pursuant to Rule 14(a) may have been improper because the only duties State Defendants owe County Defendants appear to be created by state law - duties this Court cannot enforce under Pennhurst. The federal duty State Defendants have breached is owed to Plaintiffs, not County Defendants.

In both Tate v. Frey and Benjamin v. Malcolm the state officials faced claims that they had a state-law duty to accept convicted felons from the local jails. In both cases, the Courts of Appeals rejected the state officials' contentions that

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[16] Of course, the rule that a plaintiff cannot be compelled to state a claim against an additional party if he does not wish to do so does not apply if the conditions of Fed. R. Civ. P. 19 are met.

[17] See, Advisory Committee's Note to the 1948 amendment to Rule 14 reprinted at 5 F.R.D. 446-48.

Pennhurst barred relief against them because the courts noted that the district courts' orders were based upon findings that the state officials contributed to the violation of the inmates' federal constitutional rights. See Tate, 735 F.2d at 990; Benjamin, 803 F.2d at 52. Neither Court of Appeals appeared to be concerned, as this Court is, that local officials sought and were granted relief against state officials based on the state officials' violations of the inmates' rights, not the rights of the local officials.

The Benjamin Court cited the All Writs Act, 28 U.S.C. § 1651(a),[18] as providing federal jurisdiction over the city officials' claims against the state officials. Benjamin, 803 F.2d at 53. Relying on United States v. New York Telephone Co., 434 U.S. 159, 174 (1977), the Benjamin court noted that the Supreme Court had held that the All Writs Act authorizes a federal court in exceptional circumstances to issue orders to persons, "who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, and encompasses even those who have not taken any affirmative action to hinder justice." Benjamin, 803 F.2d at 53 (citing New York Telephone, 434 U.S. at 174).

The Fifth Circuit Court of Appeals may ultimately follow Tate and Benjamin and conclude that federal jurisdiction exists over County Defendants' third-party complaint against State Defendants. For this reason, the Court will not disturb the present alignment between County and State Defendants. Nevertheless, the Court concludes that it would be remiss if it did not allow the filing of Plaintiffs' supplemental ecomplaint as an alternative basis for jurisdiction.

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[18] 28 U.S.C. § 1651(a) provides:

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The Court finds ample authorization in the Federal Rules of Civil Procedure and applicable case law that justifies such a post-trial amendment of pleadings. Fed. R. Civ. P. 21 provides, "Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." Federal courts have always recognized their duty to look beyond the pleadings on file to arrange the parties according to their true interests. See City of Indianapolis v. Chase National Bank of City of New York, 314 U.S. 63 (1941). Although such vigilance is normally required to avoid circumvention of the "complete diversity" rule of Strawbridge v. Curtiss, 3 Cranch 267 (1806), realignment may be necessary on other grounds as well.[19] In this case, Plaintiffs should be aligned as adversaries of State Defendants in order to avoid any questions of standing or jurisdiction.

State Defendants are clearly persons who should be joined if feasible under Rule 19(a)(1) because their joinder by Plaintiffs will not deprive the Court of jurisdiction and complete relief cannot be accorded among those already parties in their absence. The Fifth Circuit Court of Appeals has held that once a court has determined that a party should be joined under Rule 19(a), it should order the plaintiff to amend his

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[19] For example, in Forsberg v. Pacific Northwest Bell Telephone Co., 622 F.Supp. 1147 (D.Or. 1985), aff'd 840 F.2d 1409 (9th Cir. 1988), the district cout joined a union and union locals pursuant to Rule 19(a), then realigned the parties to ensure that any relief granted the plaintiff would be binding on the union and to protect the defendant employer from inconsistent liability. In Pennell v. Collector of Revenue, 703 F.Supp. 823 (W.D. Mo. 1989), the district court had to consider the proper alignment of the parties to determine whether all properly aligned defendants had joined in the removal petition as required. This Court itself recently had to consider the proper alignment of the parties in order to determine the necessity of a bond in a case where a preliminary injunction was entered and the United States was the nominal plaintiff. United States v. Taylor, et al., C.A. No. H-89-672. (S.D. Tex. March 21, 1989) (Memorandum and Order granting a preliminary injunction), aff'd, Nos. 89-2328, 89-2373 (5th Cir. August 28, 1989) (slip opinion).

complaint to add the party. English v. Seaboard Coast Line Railroad Co., 465 F.2d 43, 47 (5th Cir. 1972).

The United States Supreme Court has recognized that plaintiffs may have to resort to supplemental pleadings naming additional defendants where parties who were not originally joined as defendants have frustrated the Court's ability to vindicate plaintiffs' rights. See Griffin v. County School Board of Prince Edward County, 377 U.S. 218, 226-27 (1964). The best practice would require parties to file supplemental pleadings raising all issues in advance of the trial. However, in this case the Court concludes that Rule 15(b) authorizes Plaintiffs' post-trial amendment so that the pleadings will conform to the evidence presented at the August 14, 1989 trial and at the September 12, 1989 hearing.

The State Defendants previously joined as third-party defendants will not be prejudiced by Plaintiffs' post-trial supplemental complaint because the pretrial pleadings on County Defendants' third-party complaint, the Court's Orders entered May 12, 1989 and July 11, 1989, and the course of the August 14, 1989 trial and September 12, 1989 hearing gave State Defendants actual notice that a key issue was whether State Defendants' conduct resulted in the cruel and unusual punishment of the inmates in the Harris County Jail. Where the parties are actually aware of the issues to be tried, the court does not impinge on the defendant's right to due process by allowing a post-trial amendment. See Kuhn v. Civil Aeronautics Board, 183 F.2d 839, 840-41 (D.C. Cir. 1950); Wright & Miller, Federal Practice and Procedure: Civil, § 1491 (West 1971).

However, the Court concludes that it would be improper to allow Plaintiff to join, post-trial, additional state officials who did not fully participate in the proceedings already conducted as third-party defendants. Thus, the Court will allow Plaintiffs to file their supplemental complaint, but it will deny Plaintiffs' request to join additional parties and strike any

allegations in the supplemental complaint insofar as they apply to new parties.[20]

FINDINGS OF FACT

1. Plaintiffs' claims against County Defendants and State Defendants arose in this district. County Defendants' claims against State Defendants also arose in this district.

2. The Harris County Jail facilities presently consist of the central jail, located at 1301 Franklin Street, and the detention center, located in Humble, Texas. County Defendants expect to complete renovation of the old "301 San Jacinto" jail by October of 1989 and to complete construction of a new "701 San Jacinto" jail by late 1991 or early 1992.

3. The design capacity according to the Texas Commission on Jail Standards for the 1301 Franklin central jail is 3,505 inmates. The design capacity of the Detention Center is 776 inmates. Thus, the total design capacity for the present Harris County Jail facilities is 4,281 inmates.

4. When completed, the design capacity of the old "301 San Jacinto" jail will be approximately 400, and the design capacity for the new "701 San Jacinto" jail will be approximately 4,000. Thus, by early 1992, the total design capacity of the Harris County Jail facilities will be approximately 8,681 inmates.

5. The actual inmate population at the downtown central jail on July 31, 1989 was 6,926, or 197.6% of its overall design capacity. The actual inmate population at the

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[20] Plaintiffs' request to join the State of Texas would have been futile even if made prior to trial. This Court has no jurisdiction to entertain legal or equitable relief against the State of Texas as an entity. Cory v. White, 457 U.S. 85 (1982); Edelman v. Jordan, 415 U.S. 651 (1974).

Detention Center on July 31, 1989 was 1,160, or 149.4% of its overall design capacity. Thus, the total inmate population for the Harris County facilities on July 31, 1989 was 8,086, or 188.8% of the facilities' overall design capacity. See County Defendants Exhibits No. 26 admitted at the August 14, 1989 trial.

6. By far the largest classes of inmates at the Harris County Jail facilities are convicted felons ready for transfer to TDC and felony pretrial detainees. On July 31, 1989 there were 3,420 convicted felons ready for transfer to TDC and 2,340 felony pretrial detainees. A complete breakdown of the population on July 13, 1989 follows:

Pretrial Detainees:	
Felony Charges	2,340
Misdemeanor Charges	155
Both Misdemeanor & Felony Charges	291
Other Pretrial Detainees	228
	3,014
County Prisoners:	
Serving County Time	820
Serving County Fine	81
Serving County Time with Open Charges	3
Serving County Fine with Open Charges	0
	904
Class C Misdemeanors Only:	
Class C Serving Fine	34
Class C with Open Charges	68
	102
Felony Convictions:	
Awaiting Delivery Orders	29

Convictions with Additional Charges	243
Convictions Awaiting Delivery Order Dates	3,420
Convictions Awaiting Appeal	80
Convictions Serving County Time/Fine	17
	3,789
TDC Parole Violators	30
Bench Warrant Prisoners	61
Fugitives	56
Civil District Court Detainees	6
Federal Prisoners	124
Immigration Prisoners	0
	277
TOTAL:	8, 086

7. The overcrowding problem at the Harris County Jail facilities is much more severe than the overall inmate-capacity figure of 188.8% indicates. Because County Defendants have steadfastly attempted to maintain appropriate classification and segregation of inmates, the population is not evenly distributed throughout the jail facilities. Very few cellblocks house less than 100% of their design capacity; most cellblocks house far in excess of the overall population figure of 188.8% of design capacity. In fact, many cellblocks house between 300% to 500% of their capacity. See County Defendants' Exhibit Nos. 15 and 39 admitted at the August 14, 1989 trial. Extreme overcrowding is the primary cause of the conditions of confinement listed below that inmates must endure at the Harris County Jail facilities.

8. Approximately 2,800-2,900 inmates must sleep on mattresses on the floor each night. See Testimony of Captain Don McWilliams at the August 14, 1989 trial.

9. Deputies are unable to control which inmates are allowed to sleep on bunks and which are relegated to the floor. Stronger inmates are free to impose their will upon weaker inmates. See testimony of McWilliams, supra; see also testimony of Michael Keating at the August 14, 1989 trial.

10. In some cellblocks, inmates form a "human carpet" in their attempt to find space to sleep on the floor. Some inmates sleep on the floor under fixed bunks, without enough clearance to even turn over during the night. See testimony of Steve Martin at the September 12, 1989 hearing.

11. The physical design of the central jail's cellblocks prevents a deputy from observing all inmates within a cell without entering the cell to make a visual inspection. See testimony of Keating, supra.

12. The number of deputies on the jail staff is insufficient to assure the safety of all inmates under the present extreme crowding situation. Deputies do not always enter every cell each hour for a visual inspection as required by this Court's Order entered December 18, 1984. See testimony of Keating, supra. See also testimony of Perry Johnson, Michael Reese, Don McWilliams at the September 12, 1989 hearing.

13. There has been a great increase in the number of reported disciplinary violations. Prior to the overcrowding crisis, there was an average of 250 to 350 disciplinary violations reported per month. Now there are over 600 disciplinary violations reported each month, and deputies no longer report minor violations. See testimony of McWilliams, supra.

14. Frequently, one half of the plumbing within a cellblock is not operable. On occasion, none of the faucets in an entire cellblock works. See testimony of McWilliams, supra.

15. Ventilation in the central jail is very poor. There is a 10 to 15 degree difference in temperature between the inner and outer ring of a floor. The fact that many inmates are heavy smokers exacerbates the ventilation problem. In some cellblocks the stench caused by the overcrowding of inmates is overwhelming. The walls are often slimy with humidity because of constant showering. See testimony of Keating, Martin, and Johnson, supra.

16. Fire safety in the central jail is severely compromised by the extreme overcrowding of the facilities. Housing areas are not protected by a sprinkler system. Thus, in the event of a major fire the only solution would be complete evacuation of all inmates. It would be virtually impossible to evacuate the nearly 7,000 inmates housed on the twelve floors of the central jail safely and quickly. There is no second means of egress at the Detention Center. See testimony of Johnson and Keating, supra.

17. The Sheriff is unable to continuously supply inmates with basic necessities such as clothing, soap, and feminine hygiene. Some inmates are left naked with only sheets or towels to cover themselves while their clothes are being washed. Many inmates must launder their own underwear in the cellblock sink. See testimony of Keating and McWilliams, supra.

18. The Sheriff has insufficient staff and equipment to provide appropriate food service for the current population. There are not enough trays to serve all inmates at once; therefore, trays must be immediately washed and recycled during breakfast and dinner until everyone is fed. It takes approximately three hours to feed all of the inmates in the central jail. Breakfast usually begins at about 3:30 a.m. and dinner begins at about 4:00 p.m. There is no longer enough room in the "day rooms" to feed all the inmates; thus, many inmates must eat their meals in their cell while sitting on the

floor, on the toilet, in a shower stall, or on a bunk. Eating in the cells has contributed to sanitation problems. See testimony of Keating and McWilliams, supra.

19. The medical staff at the Harris County Jail facilities is unable to provide adequate medical care for the current population. Inmate requests for medical attention frequently are not granted for a month or more. On one occasion, a jail physician delayed full treatment of an inmate's ulcer because the physician simply did not believe the inmate when the inmate reported that he had blood in his vomit. As a result, the inmate died of a bleeding ulcer. Other cases of indifference were documented. The medical care provided to the inmates at the Harris County Jail facilities constitutes conscious indifference towards the inmates' serious medical needs. See testimony of Dr. Armond Start and Dr. Michael Sargant at the September 12, 1989 hearing; see also testimony of Keating, McWilliams, Reese, supra.

20. A recent outbreak of a pneumococcal infection at the Harris county Jail facilities is directly related to the overcrowded conditions. Two inmates died from this infection and approximately 30 other were hospitalized or treated at the jail clinic. See testimony of Dr. Daniel Musher at the September 12, 1989 hearing.

21. The Harris County Pretrial Services Agency (PTSA) interviews approximately 95% of all inmates entering the Harris County Jail facilities to determine which inmates may qualify for pretrial release on personal bonds without sureties. A PTSA employee interviews the inmate to determine elements of the inmate's background relevant to the inmate's likelihood of appearing in court if released on a personal bond. PTSA has developed an objective system of "scoring" each inmate. A perfect score is 7; inmates with a score of 5 or above are considered good candidates for release on a personal bond and their application is forwarded to the

appropriate judge. See testimony of Charles Noble at the August 14, 1989 trial.

22. In an average month, PTSA will interview approximately 1,700 inmates arriving with felony charges. Of the 1,700 interviewed, PTSA will forward approximately 485 to 585 applications to the appropriate state district judge. All of the applications forwarded to the district judge reflect inmates who, on an objective scale, would be good candidates for pretrial release on a personal bond. During an average month only 150 to 160 applications for personal bonds are approved. See testimony of Noble, supra.

23. While district judges are considering the release of persons generally accused of far more serious crimes requiring greater concern for public safety, the county judges have obviously given greater weight to PTSA recommendations than have the district judges. One-half of the district judges approve fewer than 100 personal bonds per year. The director of PTSA testified that many district judges do not consider the great majority of applications for personal bond that are forwarded to them. For example, on a given day, one judge reviewed only three of the 53 applications presented to him relating to inmates who would be good candidates for release on personal bond. Of the three applications the judge reviewed, only one was approved. See, State Defendants' exhibit numbers 70 and 72. See also testimony of Noble, supra.

24. In light of credible testimony that district judges refuse to consider personal bonds for inmates who by objective criteria would be good candidates for release, this Court concludes that the restriction of liberty of such pretrial detainees is arbitrary and purposeless.

25. Ultimately, counsel for State Defendants and counsel for County Defendants admitted in open court that the conditions of confinement in the Harris County Jail facilities are unconstitutional. After considering the totality of the

conditions of confinement in the Harris County Jail facilities, the Court finds that those conditions are cruel and unusual in violation of the Eighth and Fourteenth Amendments.

26. State Defendants' refusal to accept convicted felons ready for transfer to TDC has caused those inmates to suffer cruel and unusual punishment in the Harris County Jail facilities.

27. County Defendants have failed to provide a safe and suitable jail as required by the consent decree and the Court's subsequent remedial orders. Even if all TDC-ready prisoners were removed from the jail, the population would still exceed design capacity by approximately 400 inmates.

28. Because of the poor physical design of the central jail and the lack of a second means of egress from the Detention Center, the Court finds that the maximum constitutional capacity for the Harris County Jail is its overall design capacity, or a total of 4,281 inmates. This Court's previous staffing order entered December 18, 1984 assumed that a 9-9-7 staffing ratio could adequately safeguard no more than the number of inmates the facilities were designed to house.

29. State Defendants acted under color of state, not federal, law when the implemented the scheduled admissions policy that caused the overcrowding crisis in the Harris County Jail facilities. State Defendants could have complied with the requirements of the Ruiz decree without refusing to accept prisoners. Federal authority did not require them to refuse to accept inmates from county jails. The most obvious alternative would have been to timely build new prison facilities. The Court described other alternatives in its May 12, 1989 Memorandum and Order. State Defendants' actions are fairly attributable to the State for purposes of the Fourteenth Amendment.

30. An actual controversy exists between County Defendants and State Defendants. County Defendants' assertion of the right of Plaintiffs via County Defendants' third-party complaint has allowed the applicable constitutional issues to be presented vigorously and cogently.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over Plaintiffs' supplemental complaint against State Defendants pursuant to 28 U.S.C. § 1343 (a) (3).

2. The Court has jurisdiction over Plaintiffs' requests for supplemental relief pursuant to the consent judgment entered in this case on February 4, 1975 and 28 U.S.C. § 1343 (a) (3).

3. The Court has jurisdiction over County Defendants' third-party complaint pursuant to 28 U.S.C. §§ 1331, 1343 (a) (3) and 1651 (a). Moreover, the Court has ancillary jurisdiction over County Defendants' third-party complaint. See Owen Equipment and Erection Company v. Kroger, 437 U.S. 365, 375 at n. 18 (1978); Rogers v. Aetna Casualty and Surety Company, 601 F.2d 840, 843 at n. 4 (5th Cir. 1979); Wright & Miller, Federal Practice and Procedure: Civil, § 1444, at 223 n. 68 (West 1971).

4. Venue for Plaintiffs' supplemental complaint against State Defendants lies in this district because Plaintiffs' claims against State Defendants arose in this district. (See finding of fact 1.) 28 U.S.C. § 1391 (b).

5. Venue for County Defendants' third-party complaint against State Defendants lies in this district because their claims against State Defendants arose in this district. (See finding of fact 1.) 28 U.S.C. § 1391 (b). Moreover, State Defendants, as third-party defendants pursuant to Rule 14, may not contest venue. F&D, Inc. v. O'Hara & Kendall Aviation,

Inc., 547 F.Supp. 44, 45 (S.D. Tex. 1982). See also Lone Star Package Car Co. v. Baltimore & O.R. Co., 212 F.2d 147 (5th Cir. 1954); Wright & Miller, Federal Practice and Procedure: Civil, § 1445 at 240 n. 14 (West 1971).

6. Although the Eleventh Amendment bars this Court from ordering State Defendants to obey state law, Pennhurst School & Hospital v. Halderman, 465 U.S. 89 (1984), the Court has jurisdiction to assure that State Defendants conform their conduct to federal constitutional standards. Ex parte Young, 209 U.S. 123 (1908).

7. This Court's jurisdiction is limited to "actual cases or controversies." Art. III, § 2, U.S. Const.; Flast v. Cohen, 392 U.S. 83 (1968). A corollary of this rule requires a party to have "standing" to assert its claims. The United States Supreme Court has noted that the "gist" of standing requires a litigant to allege "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues. . . ." Baker v. Carr, 369 U.S. 186, 204 (1962). In another context, the Supreme Court has held that a litigant must show some "injury to himself that is likely to be redressed by a favorable decision." Simon v. Eastern Kentuky Welfare Rights Organization, 426 U.S. 26, 38 (1976). Although litigants are not normally allowed to assert the rights of third parties, the Supreme Court has made it clear that this limitation is not constitutionally mandated. Craig v. Boren, 429 U.S. 190, 193 (1976). Instead, the limitation on a litigant's ability to assert the right of a third party is simply a "rule of self-restraint" based on "prudential objectives." Id. So long as a litigant asserts a sufficiently concrete interest in the outcome of its suit to meet the case or controversy requirement of Article III, a federal court may allow the litigant to assert the rights of a third party where the applicable constitutional questions have been and continue to be presented vigorously and `cogently'. . . ." Id at 194; see also Singleton v. Wulff, 428 U.S. 106, 112-16 (1976); Benjamin, 803 F.2d at 54.

8. In order to be entitled to relief under 42 U.S.C. § 1983, a party must prove: (1) that the defendant deprived him of a right secured by the Constitution or laws of the United States, and (2) that the defendant deprived him of that right under color of state law. Gomez v. Toledo, 446 U.S. 635, 640 (1980); Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 155 (1978); Sims v. Jefferson Downs, Inc., 778 F.2d 1068, 1076 (5th Cir. 1985).

9. The Eighth Amendment, which prohibits cruel and unusual punishment, is applicable to the states through the Fourteenth Amendment. Rhodes v. Chapman, 452 U.S. 337, 344-45 (1981); Robinson v. State of California, 370 U.S. 660, 666 (1962).

10. Normally, the involvement of a state official "plainly provides the state action essential to show a direct violation of [a plaintiff's] Fourteenth Amendment . . . rights, whether or not the actions . . . were official authorized or lawful." Flagg Brothers, 436 U.S. at 157 n.5 (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970)). In an action pursuant to 42 U.S.C. § 1983, the statutory requirement of action "under color of state law" and the "state action" requirement of the Fourteenth Amendment are identical. Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 929 (1982). However, state officials who act solely pursuant to federal authority, act under color of federal, not state, law and are not subject to liability under 42 U.S.C. § 1983. District of Columbia v. Carter, 409 U.S. 418, 424 (1973); Askew v. Bloemker, 548 F.2d 673, 676-77 (7th Cir. 1976). A party deprived of his federally-protected rights by an official acting under color of federal law must state a claim under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) and its progeny. See, Carter, 409 U.S. at 610. (See Finding of Fact 29.)

11. There is no static test by which to determine whether conditions of confinement are cruel and

unusual. Rhodes, 452 U.S. at 346. The Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Id. at 346 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)). This Court need not separately weigh each of the challenged constitutional practices and conditions; instead, it must look to "the totality of the conditions" existing in the Harris County Jail facilities. Alberti v. Klevenhagen, 790 F.2d 1220, 1224 (5th Cir. 1986) (citing Ruiz v. Estelle, 679 F.2d 1115, 1139 (5th Cir.), modified on other grounds, 688 F.2d 266 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983). "The totality of conditions of confinement does not offend the Constitution unless prison conditions are cruel and unusual, not merely harsh and restrictive." Alberti, 790 F.2d at 1224 (quoting Ruiz, 679 F.2 at 1140).

12. In determining the constitutionality of the confinement of pretrial detainees, the Court must apply the Due Process Clause of the Fourteenth Amendment, not the Eighth Amendment. Bell v. Wolfish, 441 U.S. 520, 535 n.16 (citing Ingraham v. Wright, 430 U.S. 651, 671-72 n.40 (1977)). Under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt. Bell, 441 U.S. at 535. However, not every disability imposed during pretrial detention amounts to "punishment" in the constitutional sense. Id. at 537. For example, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment." Id. at 539. Conversely, if a restriction or condition is not reasonably related to a legitimate goal - if it is arbitrary or purposeless - this Court may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees. Id. at 539.

13. In determining the amount of bail required to secure the release of an accused prior to trial, the Harris County Courts at law and District Courts are governed in

the exercise of their discretion by the Constitution and by the following rules:

> 1. The bail shall be sufficiently high to give reasonable assurance that the undertaking will be complied with.
>
> 2. The power to require bail is not to be so used as to make it an instrument of oppression.
>
> 3. The nature of the offense and the circumstances under which it was committed are to be considered.
>
> 4. The ability to make bail is to be regarded, and proof may be taken upon this point.
>
> 5. The future safety of a victim of the alleged offense may be considered.

Tex. Code Crim. Proc. Ann. art. 17.15 (Vernon Supp. 1989).

The County Courts at law and District Courts also have the discretion to release a defendant on his personal bond without sureties or other security. Tex. Code Crim. Proc. Ann. art 17.03 (Vernon 1977). The primary purpose of an appearance bond is to secure the presence of a defendant in court at his trial. Ex parte Ivey, 594 S.W.2d 98 (Tex. Crim. App. 1980).

14. Pretrial detainees are entitled to reasonable medical care unless the failure to supply the care is reasonably related to a legitimate governmental objective. Cupit v. Jones, 835 F.2d 82 (5th Cir. 1987).

15. Convicted inmates are entitled to medical care that does not constitute deliberate indifference to their

serious medical needs. Estelle v. Gamble, 429 U.S. 97, 104 (1976).

16. Upon a finding that State Defendants and County Defendants are liable for the unconstitutional conditions of confinement presently existing in the Harris County jail facilities, the Court must fashion "the least intrusive remedy that will still be effective." Ruiz, 679 F.2d at 1145. This proposition does not mean that the Court must exhaust all conceivable avenues of relief against County Defendants before imposing relief against State Defendants. See, Benjamin, supra at 53. State Defendants and County Defendants deserve the same respect from the Court.

17. Under Texas law, the county sheriffs and commissioners courts are the keepers of the jails. Tex. Local Gov't Code Ann. §§ 351.001-.015 and §§ 351.041-.042 (Vernon 1988).

18. Under Texas law, TDC (now TDCJ, or the Texas Department of Criminal Justice) is responsible for the confinement of convicted felons. Tex. Penal Code Ann. §§ 12.32-.34 (Vernon 1974 and Cumm. Supp. 1989); Tex. Code Crim. Proc. Ann. art. 42.09 (Vernon Supp. 1989).

19. Prior to September 1, 1989, the effective date of H.B. 2335, the transfer of convicted felons from the Harris County Jail to TDC was governed by the interplay between Tex. Code Crim. Proc. Ann. art 42.09 (West Supp. 1989) and Tex. Rev. Civ. Stat. Ann. art. 6166r (West 1970). Sections 2 and 3 of Article 42.09 of the Texas Code of Criminal Procedure explicitly provide that convicted felons shall be committed to TDC under certain circumstances pending, or at the conclusion of, an appeal. Sections 1 and 4 of Article 42.09, however, appear to envision at least a temporary stay at the jail when a felon does not appeal his conviction or when a felon appeals his conviction but his sentence is for a term of ten years or less. In the past, a convicted felon's temporary confinement

in the Harris County Jail created no serious problems because Article 6166r required TDC to make suitable provisions for the "safe and speedy transportation of prisoners from counties where sentenced to the State penitentiary. . . ."

20. H. B. 2335 made two important changes with respect to the transfer of convicted felons from the county jails to TDC. First, section 3.04 of H.B. 2335 deleted the requirement that TDC's acceptance of convicted felons be "speedy." Second, section 3.06 of H.B. 2335 requires the Texas Board of Criminal Justice to adopt and enforce an allocation formula that limits the number of convicted felons the institutional division will accept from the counties until sufficient capacity is available in the institutional division. H. B. 2335 did not, however, relieve State Defendants of their responsibility for the confinement of convicted felons. The State of Texas is free to allocate the admissions of felons into the penitentiary in virtually any manner it chooses so long as the allocation does not result in the cruel and unusual punishment of inmates. However, when it becomes clear that convicted felons are being confined in conditions that violate the Eighth Amendment, the relevant inquiry becomes who is responsible for the confinement of these inmates. Fortunately, H.B. 2335 provides a clear answer to this inquiry. Section 1.02 (a) (1) provides, "The department [TDCJ, formerly TDC] is the state agency with primary responsibility for . . . the confinement, supervision, and rehabilitation of felons. . . ." Thus, the fact that the State of Texas has "virtually complete freedom to decide who will be responsible" for the confinement of felons provides no shield from liability for State Defendants in this case because state law clearly places the primary responsibility for the confinement of felons upon them. See Bush v. Viterna, 795 F.2d 1203, 1209 (5th Cir. 1986).

21. In essentially the same circumstances, the Fifth Circuit Court of Appeals has held that state officials cannot disclaim responsibility for cruel and unusual conditions of confinement of prisoners committed to their custody on the

ground that they have no control over the operation of local jails. Stewart v. Winter, 669 F.2d 328 (5th Cir. 1982). Subsequently, the Second Circuit came to the same conclusion. See Benjamin, 803 F.2d at 51. Bush v. Viterna supra did not purport to overrule Stewart v. Winter. In fact, the Bush panel could not have overruled Stewart because the Fifth Circuit Court of Appeals adheres to the rule that only intervening Supreme Court authority or the Court sitting en banc can overrule a previous panel decision. Wilson v. Taylor, 658 F.2d 1021 (5th Cir. 1981); Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981), cert. denied, 455 U.S. 907 (1982); Fulford v. Klein, 529 F.2d 377 (5th Cir. 1976), majority opinion adopted by en banc court, 550 F.2d 342 (5th Cir. 1977). The Court is not aware of any intervening en banc or Supreme Court authority purporting to overrule Stewart. Thus, to the extent that H.B. 2335 attempts to exculpate State Defendants from liability for the cruel and unusual punishment of convicted felons incarcerated at county jails, it is ineffective.

22. A convicted felon ready for transfer to TDC is defined as:

> (a) An individual who is being confined pursuant to a judgment of conviction and sentence imposed in a felony case pursuant to a plea of guilty or nolo contendere (such individual being deemed "ready for transfer" on the date of sentencing); or
>
> (b) An individual who is being confined pursuant to a judgment of conviction and sentence imposed in a felony case pursuant to the verdict or a jury or judge after a plea of not guilty by the defendant (such individual being deemed "ready for transfer" on (1) the date the defendant is taken into custody

after affirmance of his or her conviction, if the defendant appeals the conviction and is released on bail pending disposition of the appeal, pursuant to Tex. Crim. Proc. Code Ann. § 42.09(2) (Vernon Supp. 1989); or on (2) the date the defendant requests transfer to the TDC, if the defendant is convicted of a felony and his sentence is a term of ten (10) years or less and he gives notice of appeal, pursuant to Tex. Crim. Proc. Code Ann. 42.09(4) (Vernon Supp. 1989; or (3) the date notice of appeal is filed or the time for filing notice of appeal passes, whichever date first occurs, if a defendant is convicted of a felony and sentence to death, life or a term of more than ten (10) years in the TDC pursuant to Tex. crim. Proc. Code Ann. § 42.09(3) (Vernon Supp. 1989)); and

(c) the individual has no other criminal detainers or criminal cases pending in county, state or federal trial courts; and

(d) all paperwork customarily required to transfer the individual to TDC has been satisfactorily completed pursuant to Tex. Crim. Proc. Code Ann. §§ 42.03(3), (4) (Vernon 1979) and 42.09(8) (Vernon Supp. 1989).

CONCLUSION

As indicated by the findings and conclusions above, the Court has determined that State Defendants and

County Defendants are liable for the unconstitutional conditions of confinement in the Harris County Jail facilities.

The Fifth Circuit Court of Appeals has correctly bifurcated this case so that authority to decide any relief against State Defendants that affects the management or operations of the Department of Corrections rests with Judge Justice, the presiding judge in the Ruiz prison case. Despite the urgency for immediate remedy amply demonstrated by this record, the Court concludes that it should delay the imposition of relief against County Defendants so that the relief formulated by Judge Justice against State Defendants may be coordinated and interwoven with the remedial action required of the County. This appears to be the most logical approach the Court can take to determine "the least intrusive remedy that will still be effective." The Court envisions the issuance of a joint order or simultaneous orders of the judges.

But the solution to unconstitutional conditions in state penitentiaries and local jails requires more than the joint effort of two federal judges. Just decisions should be made by those who have the primary responsibility to make them -- the appropriate state and county officials. The Governor and the County Judge of Harris County have shown a willingness to find solutions fair to the citizenry of Harris County and the State and true to the constitution. Prior to the recent evidentiary hearings, Governor Clements and County Judge Lindsey, their staffs and attorneys, together with the court appointed monitors and counsel for the inmates, met in a marathon session to resolve differences and to find solutions to the growing national problem of prison overcrowding, which is particularly acute here.

The evidentiary hearings themselves were conducted in a dispassionate, orderly and thorough fashion. Early rancor and emotionalism dissipated in the face of an evidentiary record in which much was undisputed. In light of

these factors, meaningful dialogue among the parties should continue.

Time will be required for Judge Justice to review proceedings here. This interval can be used by the parties to make every attempt to resolve issues without unnecessary judicial intervention.

The overcrowding in the Harris County facilities is extreme. Large and immediate reductions in inmate population are in order. The Court suggests that the parties look to the large groups of transfer-ready felony inmates, pretrial felony detainees and parole-eligible prisoners for such reductions. The state judiciary might be consulted so that recognition be given to the realistic policy of personal recognizance release of pretrial detainees as a more palpable alternative to the early release on parole of a like number of convicted felons by the use of the Texas Prison Management Act. Obviously all other means and options must be carefully scrutinized in the process. Accordingly, it is hereby

ORDERED that Plaintiffs' motion for leave to file a supplemental complaint is GRANTED but Plaintiffs' request to join additional parties is DENIED. Allegations in the supplemental complaint are STRICKEN insofar as they apply to new parties. It is further

ORDERED that State Defendants are liable to County Defendants on County Defendants' third-party complaint. It is further

ORDERED that State Defendants are liable to Plaintiffs on Plaintiffs' supplemental complaint. It is further

ORDERED that County Defendants' third-party complaint and Plaintiffs' supplemental complaint are TRANSFERRED to the Honorable William Wayne Justice for proceedings in accordance with the mandamus opinion of the Fifth Circuit Court of Appeals entered in this case. It is further

ORDERED that the Special Master arrange a meeting of all the principals and parties involved in this case in order to facilitate a settlement regarding the appropriate relief to be imposed.

SIGNED in Houston, Texas, this 25th day of September, 1989.

JAMES DeANDA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX Y

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI; ET AL.	§	
VS.	§	CIVIL ACTION
	§	NO. H-72-1094
JOHNNY KLEVENHAGEN; ET AL.	§	

MEMORANDUM AND ORDER

Pending before the Court are Third-Party Defendants'[1] motion to dismiss, or, in the alternative, for joinder of all Texas counties and all inmates allegedly backlogged in Texas county jails, Third-Party Defendants' motion to dismiss for lack of venue, or, to transfer venue, and Third-Party Defendants' motion to stay these proceedings pending an application to the Judicial Panel on Multi-district Litigation.

A detailed recitation of the tortuous history of this case is unnecessary for present purposes. Suffice it to say that Defendants Harris County Commissioners Court and the Sheriff of Harris County have never fully succeeded in

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[1]Third-Party Defendants are the following state officials who control the admissions policy and population levels of the Texas Department of Corrections (TDC): William P. Clements, Governor of the State of Texas, James Lynaugh, Director of TDC, Charles T. Terrell, Chairman of the Texas Board of Corrections, Deralyn R. Davis, Joseph V. Lamantia, Allan Bruce Polunsky, James M. Eller, F. L. "Steve" Stephens, Dennis R. Hendrix, Robert Mann, and Jerry H. Hodges, Board Members of the Texas Board of Corrections.

complying with the terms of a 1975 consent decree[2] and subsequent remedial orders[3] that were designed to ensure that the conditions of confinement in the Harris County jails met applicable constitutional and statutory requirements. In fact, in 1985, the Court actually found Defendants to be in contempt for their failure to hire sufficient deputies as ordered. Alberti, et al. v. Sheriff of Harris County, No. C.A.-H-72-1094 (S.D. Tex. May 24, 1985) (order finding Defendants in civil contempt).

After the Court appointed special masters in 1987 to monitor Defendants' compliance with the Court's remedial orders, it appeared that a spirit of cooperation between the Plaintiff class and Defendants would facilitate continued progress towards full compliance with all Court orders with a minimum of direct judicial intervention. However, through 1988 it became obvious that TDC's refusal to accept all convicted felons as required under state law made it absolutely impossible for Harris County and the Sheriff to comply with this Court's orders.

By the end of 1988, the overcrowded conditions in the Harris County jails had reached crisis proportions. After considerable negotiations between Plaintiffs, the Special Master, and Defendants, the parties requested the entry of an essentially agreed order[4] that required the Sheriff to begin delivering at least 250 male and 40 female convicted felons to TDC each week.[5] When TDC officials refused to accept any

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[2]Alberti, et al. v. Sheriff of Harris County, No. C.A.-H-72-1094 (S.D. Tex. Feb. 4, 1975) (consent judgment).

[3]See, Alberti, et al. v. Sheriff of Harris County, 406 F.Supp. 649 (S.D. Tex. 1975); Alberti v. Sheriff of Harris County, 600 F.Supp. 443 (S.D. Tex. 1984) aff'd 790 F.2d 1220 (5th Cir. 1986).

[4]Actually, Defendants were careful not to "agree" to the entry of the order, but they were willing to express their "non-opposition" to the entry of the requested order.

[5]Alberti, et al. v. Sheriff of Harris County, et al., No. C.A.-H-72-1094 (S.D. Tex. Nov. 8, 1988) (order requiring delivery of convicted felons to TDC).

convicted felons above its meager self-imposed quota, a new and more complex phase of litigation began.

By an order entered January 20, 1989, the Court granted Harris County and the Sheriff leave to implead Third-Party Defendants, and, on the same date, a third-party complaint was filed. Third-Party Defendants responded with a series of motions to dismiss, to transfer venue, to join additional parties, to stay proceedings, and to abstain from exercising jurisdiction. After considering the briefs submitted by the parties and the applicable law, the Court has decided to deny each and every one of Third-Party Defendants' motions. A discussion of the relevant issues raised by Third-Party Defendants follows:

I. Third-Party Defendants' motion to stay proceedings pending an application to the Judicial Panel on Multidistrict Litigation.

Third-Party Defendants ask this Court to stay proceedings pending an application to the Judicial Panel on Multidistrict Litigation for consolidation of related litigation pursuant to 28 U.S.C. § 1407. Harris County and the Sheriff respond by arguing that this case is not suitable for consolidation under 28 U.S.C. § 1407. However, the question of whether this case is suitable for pretrial consolidation is for the Judicial Panel on Multidistrict Litigation, not this Court, to decide.

The simpler question is whether this Court should stay proceedings pending such an application. This question is easily answered in the negative for two reasons. First, Rule 18 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation explicitly provides:

> The pendency of a motion . . . before the Panel concerning transfer . . . of an action pursuant to 28 U.S.C. § 1407 does not affect or suspend orders and pretrial proceedings in the district

> court in which the action is pending and does not in any way limit the pretrial jurisdiction of that court.

Second, although Third-Party Defendants filed their motion to stay proceedings on February 6, 1989, since that time there has been no indication that such an application has been filed with the Judicial Panel on Multidistrict Litigation.[6] Obviously, Third-Party Defendants are not seriously interested in pursuing the consolidation of this case for multidistrict litigation. And, as already indicated, even if Third-Party Defendant had filed a motion to transfer pursuant to 28 U.S.C. § 1407, there would be no reason to stay proceedings in this case.

II. Third-Party Defendants' motion to dismiss for lack of venue, or to transfer venue.

Third-Party Defendants ask this Court to dismiss the complaint against them for lack of venue, or, alternatively, to transfer this case to the United States District Court for the Western District of Texas, Austin Division. In support of their motion, Third-Party Defendants argue that venue for Defendants' third-party complaint properly lies only in the district where all Third-Party Defendants reside or where the claim arose. See, 28 U.S.C. § 1391(b).

However, Third-Party Defendants appear to have overlooked considerable authority in this circuit and elsewhere supporting the proposition that Fed. R. Civ. P. 14 "overrides the general venue statute, 28 U.S.C. § 1391, and that an impleaded third-party defendant may not raise the venue issue." F&D, Inc. v. O'Hara & Kendall Aviation, Inc., 547 F.Supp. 44, 45 (S.D. Tex. 1982). See also, Lone Star Package Car Co. v. Baltimore

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[6]Rule 7(c) of the Rules of Procedure of the Judicial Panel on Multi-district Panel on Multi-district LItigation requires copies of any motions for transfer pursuant to 28 U.S.C. § 1407 to be filed in each district court in which an action is pending that will be affected by the motion. A review of the record in this case reveals that no such motion has been filed.

& O.R. Co., 212 F.2d 147 (5th Cir. 1954); Wright & Miller, Federal Practice and Procedure: Civil, § 1445 n.14 (West 1971).

Even if the venue requirements of 28 U.S.C. § 1391(b) applied to the third-party complaint, the Court finds that the claim arose in this district and that it would not serve the convenience of the parties of the interests of justice to transfer this case.

III. Third-Party Defendants' motion to dismiss, or, in the alternative, for joinder of all Texas counties and all inmates allegedly backlogged in Texas county jails.

Third-Party Defendants' motion to dismiss, etc. turns out to be a tour de force listing, according to the Court's count, six different reasons why the Court should either dismiss the third-party complaint, abstain from exercising jurisdiction over the third-party complaint, or join additional parties. The Court will examine each argument separately below.

A. Third-Party Defendants have no duty to remedy constitutional violations of inmates' rights in local jails.

Third-Party Defendants cite Bush v. Viterna, 795 F.2d 1203 (5th Cir. 1986) in support of their argument that they have absolutely no duty to remedy constitutional violations of inmates' rights in local jails. In particular, Third-Party Defendants rely on the Bush court's statement that "The states have virtually complete freedom to decide who will be responsible for such tasks [as operating a prison], and therewith to determine who will be held liable for civil rights violations that occur in the course of carrying them out." Third-Party Defendants then note that under Texas law the county sheriffs and commissioners courts are keepers of the jails. See, Bush, 795 F.2d at 1206; see also, Tex. Local Gov't Code Ann. §§ 351.015 and §§ 351.042 (Vernon 1988).

The Court, however, finds Bush to be so factually and legally dissimilar to the present case that it cannot be used as a shield from liability here. The plaintiffs in Bush had sued the Texas Commission on Jail Standards alleging that the Commissions' failure to promulgate and enforce sufficient regulations ensuring constitutional conditions in county jails entitled them to relief under 42 U.S.C. § 1983. The Court of Appeals held that the Commission could not be held vicariously liable for the acts of county officials in the maintenance of their jails. The Court of Appeals also held that because the Commission had no state-law duty to correct violations of its regulations by county jails, the Commission's failure to act could not be considered to be a cause of any injury that inmates at county jails may suffer.

In the present case, Harris County and the Sheriff are seeking to impose direct, not vicarious, liability upon Third-Party Defendants. In contrast to the Texas Commission on Jail Standards, Third-Party Defendants have a state and constitutionally imposed duty to provide appropriate conditions of confinement for the approximately 3500 convicted felons currently incarcerated in the Harris County jails. Third-Party Defendants cannot disclaim their responsibility for providing constitutional conditions of confinement to convicted felons by simply refusing to accept physical custody of those inmates. See, Stewart v. Winter, 669 F.2d 328 (5th Cir. 1982).[7]

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[7]See also, Benjamin v. Malcolm, 803 F.2d 46, 51 (2d Cir. 1986), cert. denied, 480 U.S. 910 (1987) (noting that the State of New York could not disclaim its federal constitutional duties to "state-ready" prisoners because such prisoners "are not those of some other state, country or planet, but its own prisoners who have been convicted by new York State courts for New York state felonies.")

B. Even if Third-Party Defendants had a state-law duty to accept convicted felons into TDC, this Court has no jurisdiction to enjoin state officials to comply with state law.

Third-Party Defendants correctly point out that this Court has no jurisdiction to order state officials to obey state law. Pennhurst School & Hospital v. Halderman, 465 U.S. 89 (1984). However, this well-recognized principle does not bar this Court from ordering state officials to conform their conduct to federal constitutional standards. Ex Parte Young, 209 U.S. 123 (1908).

In the present case, Third-Party Defendants have two distinct duties: First, Third Party Defendants have a state-imposed duty to "speedily" accept convicted felons into TDC. Tex. Rev. Civ. Stat. Ann. art. 6166r (Vernon 1970). Second, Third-Party Defendants have a federal constitutional duty to not impose cruel and unusual punishment upon persons convicted of a felony in this state. If Third-Party Defendants have merely failed to "speedily" accept convicted felons into TDC as required by Tex. Rev. Civ. Stat. Ann. art. 6166r (Vernon 1970), this Court is powerless to compel compliance. However, if Third-Party Defendants are directly responsible for the cruel and unusual punishment of convicted felons, this Court certainly has the authority to compel compliance with constitutional standards.[8] Alberti v. Klevenhagen, 790 F.2d 1220, 1226-1228 (5th Cir. 1986).

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[8]Obviously, in many less-populated counties across Texas Third-Party Defendants may have failed to comply with their state-law duty to accept convicted felons into TDC without causing the cruel and unusual punishment of the inmates remaining in the county jails. It would appear that a federal district court would be without jurisdiction to fashion a remedy in such a case.

C. Any duty Third-Party Defendants have to accept convicted felons into TDC must give way to capacity orders entered in Ruiz v. Procunier, No. H-78-987-CA (S.D. Tex.).

Third-Party Defendants argue that the Supremacy Clause of the United States Constitution requires them to obey a court-approved stipulation entered in Ruiz v. Procunier, No. H-78-987-CA (S.D. Tex.), which requires them to limit the inmate population within the TDC system to 95% of capacity. Third-Party Defendants are certainly correct that they must obey the Court's orders entered in the Ruiz case. however, Third-Party Defendants' duty to obey orders in the Ruiz case does not justify an exemption from their duty to not impose cruel and unusual punishment upon convicted felons they refuse to accept.

Although Third-Party Defendants have attempted to convince this Court that it is impossible to comply with applicable Ruiz orders while at the same time accepting delivery of the convicted felons presently incarcerated in the Harris County jails, such a conflict does not exist in reality. The applicable population capacity order in Ruiz simply requires that the overall inmate population within the TDC system not exceed 95% of design capacity. The stipulation does not require TDC officials to refuse to accept the delivery of newly-convinced felons. An infinite variety of politically unpopular solutions exist which would allow Third-Party Defendants to maintain their goal of 95% capacity while, at the same time, accepting all convicted felons from the Harris County jails.[9]

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[9]For example, Third-Party Defendants could have begun their now-ambitious prison building campaign earlier and with more vigor, they could immediately enter into contracts with other suitable facilities to provide space for the felons, or, most unpopular of all, they could make significant use of the Texas Prison Management Act, Tex. Rev. Civ. Stat' Ann. art. 6184o (Vernon Supp. 1989), which allows the early release of inmates under certain conditions.

D. This Court should abstain from exercising jurisdiction over the claims made against Third-Party Defendants in deference to the resolution of unsettled questions of state law in County of Nueces v. Texas Department of Corrections, No. 452,071 (250th Judicial District Court of Travis County, Texas).

This Court recognizes its duty to abstain from exercising jurisdiction over a case where a state court determination of an ambiguous state statute would render the determination of a federal constitutional issue unnecessary. Railroad Commission of Texas v. Pullman, 312 U.S. 496 (1941). Third-Party Defendants argue that this Court should abstain from exercising jurisdiction in this case because a state district court is presently considering TDC's duty to "speedily" accept convicted felons pursuant to Tex. Rev. Civ. Stat. Ann. art. 6166r (Vernon 1970). See, County of Nueces v. Texas Department of Corrections, No. 452-071 (250th Judicial District Court of Travis County, Texas).

However, abstention under the Pullman doctrine is only appropriate where "the issue of state law is uncertain." Reetz v. Bozanich, 397 U.S. 82, 86 (1970) (citing, Harman v. Forssenius, 380 U.S. 528 (1965)). The Court finds that Third-Party Defendants' state-law duty to accept convicted felons pursuant to Tex. Rev. Civ. Stat. Ann. art. 6166r (Vernon 1970) is not ambiguous at all. In fact, the state-court judge in the County of Nueces case recently held that TDC had a duty to accept all convicted felons as a matter of law.[10] The only remaining issue left to be decided in the County of Nueces case is whether it is possible for TDC to comply with this state-law duty in light of the orders entered by the Ruiz court. The question of TDC's ability to comply with its clear state-law duty to accept convicted felons from the county jails is not the kind of an ambiguous state-law issue that merits deference from this Court. This Court can determine whether Third-Party

[10]See, Exhibit A attached to Third-Party Defendants' supplemental memorandum in support of their motion to dismiss filed on March 27, 1989.

Defendants are capable of accepting additional convicted felons without impinging on any concerns of federalism or comity.

E. This Court should abstain from exercising jurisdiction over the claims made against Third-Party Defendants in deference to TDC's scheduled admissions policy.

Next, Third-Party Defendants argue that this Court should accord TDC's own scheduled admissions policy the same degree of deference as the United States Supreme Court gave the Texas Railroad Commission's regulations in Burford v. Sun Oil Co., 319 U.S. 315 (1943). Burford, however, provides no justification for abstention under the present circumstances. In Burford, the Supreme Court found that judicial review of the Railroad Commission's decisions in state court was expeditious and adequate. Burford, 319 U.S. at 333-334. In the present case, there is absolutely no meaningful review in the state courts of TDC's scheduled admissions policy. Thus, abstention would be inappropriate.

F. All counties in the State of Texas and all inmates allegedly backlogged in county jails should be joined as parties to this case.

Third-Party Defendants argue that all counties in the State of Texas and all inmates allegedly backlogged in county jails should be joined as parties to this case pursuant to Federal Rules of Civil Procedure 19, 20, 21, and 22. First, Third-Party Defendants argue that all Texas counties should be a party to this case because if this Court were to order TDC to accept additional convicted felons from Harris County, the remaining Texas counties would be prejudiced. Again, this argument improperly presumes that Third-Party Defendants cannot make effective use of the remedies described in footnote 9, above.

Second, Third-Party Defendants argue that the failure to join all other Texas counties and backlogged inmates would leave Third-Party Defendants subject to "multiple or inconsistent obligations." This argument is also faulty. The fact that Third-Party Defendants may be liable to more than one county does not render all counties necessary parties.[11] Finally, a judgment in this case could not give rise to the type of internal inconsistency that Rule 19 seeks to avoid. Accordingly, it is hereby

ORDERED that Third-Party Defendants' motion to dismiss, or, in the alternative, for joinder of all Texas counties and all inmates allegedly backlogged in Texas county jails is DENIED. It is further

ORDERED that Third-Party Defendants' motion to dismiss for lack of venue, or, in the alternative, to transfer venue is DENIED.

It is further

ORDERED that Third-Party Defendants' motion to stay proceedings pending an application to the Judicial Panel on Multidistrict Litigation is DENIED.

DONE in Houston, Texas, this 12th day of May, 1989.

JAMES DeANDA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

---

[11] See, Cortez v. County of Los Angeles, 96 F.R.D. 427 (C.D. Cal. 1983) and cases cited therein holding that Rule 19 does not require the jonider of all plaintiffs advancing tort claims against the same defendant for injuries arising out of the same transaction or occurrence.

APPENDIX Z

Tex Gov't Code § 499.071. Allocation formula (Formerly Art. 6166a-4 (a) - (b).)

(a) The Texas Board of Criminal Justice shall develop, adopt, and enforce an allocation formula that fairly and equitably allocates to each county or group of counties served by a community corrections and supervision department the number of institutional division admissions allocated to the county or counties until sufficient capacity is available in the institutional division. In devising the formula, the board shall consider relevant factors for each county or group of counties served by a department and shall assign weights to those factors as determined appropriate by the board. The factors shall include but are not limited to:

(1) the percentage of prison admissions for the entire state that were used by the county or counties in the preceding 12 months;

(2) the percentage of the state's violent index crime that occurred in the county or counties in the preceding 12 months;

(3) the percentage of the state's total index crime that occurred in the county or counties in the preceding 12 months;

(4) the percentage of the state's total arrests under the Texas Controlled Substances Act (Article 4476-15, Vernon's Texas Civil Statutes) that occurred in the county or counties in the preceding 12 months;

(5) the percentage of the state's population residing in the county or counties; and

(6) the percentage of the state's total unemployment in the county or counties.

(7) the percentage of all defendants serving sentences for felonies who are paroled from the institutional division, a jail in this state, a federal correctional institution, or a jail or correctional institution in another state in the preceding

12 months and who were released to reside in the county or counties.

(b) If the board is unable to obtain for a factor listed in Subsection (a) information for the preceding 12-month period, the board shall consider the most recent information available for that factor.

(c) The board shall revise the formula annually.

APPENDIX AA

37 TAC Ch. 152 (in pertinent part):

§ 152.1. Purpose. Texas Civil Statutes, Article 6166a-4, requires the board to adopt and enforce an allocation formula to fairly and equitably allocate to each county the Available Institutional Division admissions until sufficient capacity is available in the Institutional Division to accept all prisoners eligible for transfer to the Institutional Division. An annual determination by the board that there is insufficient capacity in the Institutional Division to accept all prisoners from Texas county jails who are eligible for transfer into the Institutional Division as soon as they become eligible, shall make it necessary to adopt and enforce such a formula.

§ 152.2. Definitions and Exceptions.

(a) The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Available institutional division admissions - The total number of beds available within the Institutional Division for intake of prisoners is based upon the estimated rate of release of prisoners from the Institutional Division, minus .03333 of those beds which is adequate to allow the Institutional Division to expeditiously receive from

the counties any new prisoners who are sentenced to death, or who are recaptured escapees, pre-parole violators, Institutional Division prisoners returning from federal bench warrants, interstate corrections compact transfers, and out-of-state parole violators. Therefore, the number of admissions available is based upon an estimated rate of prisoner flow through the Institutional Division to maintain the Institutional Division capacity.

(2) Institutional division capacity - The total number of beds available for use within the Institutional Division in accordance with the limitations on capacity and its use imposed by federal court orders in *Ruiz v. Lynaugh*, Number H-78-987 (Southern District Texas, Houston Division.) Available institutional capacity at the time of the adoption of this section will be no more than 43,951. When the Lewis unit is populated and in operation, available Institutional Division capacity will be no more than 49,681.

(b) The Institutional Division may suspend or cancel admissions when the acceptance or transport of prisoners would be unsafe, such as in cases of extremely severe weather or civil disturbance, or would cause non-compliance with federal court orders. The Institutional Division is not required to make up for admissions so suspended or canceled. On days that the Institutional

Division is closed due to holidays, the number of admissions is decreased by the number of days of closure multiplied by the current number of daily admissions. The balance of admissions for the weeks is prorated out to the counties based upon their allocated percentage of intake.

(4)

No. 91-1202

In the
Supreme Court of the United States
October Term, 1991

Ann Richards, Governor of Texas; Selden Hale, III, Mamie Moore Proctor, Hon. Clarence N. Stevenson, Allan B. Polunsky, James M. Eller, F.L.Stephens, Jerry H. Hodge, Joshua W. Allen, Sr., Ellen J. Halbert, Members, Texas Board of Criminal Justice; James A. Lynaugh, Executive Director, Texas Department of Criminal Justice,

Petitioners

v.

Johnny Klevenhagen, Harris County Sheriff; John Lindsay, Harris County Judge; El Franco Lee, Jim Fonteno, Steve Radack, Jerry Eversole, Harris County Commissioners,

Respondents

v.

Lawrence R. Alberti, Jimmy E. Collins, Henry C. Langer, Jose' J. Pina, II, Pat Reed, Wesley Sellers, individually and on behalf of all others similarly situated,

Respondents

On Petition for Certiorari
To the United State Court of Appeals
For the Fifth Circuit

Respondents' Brief in Opposition

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Questions Presented

As presented by petitioners and to which respondents' brief in opposition is directed:

1. Whether, under principles of federalism and Article III of the Constitution, federal courts have jurisdiction to decide unsettled questions of state law involving a dispute between two levels of state government concerning state fiscal policy and a complex regulatory scheme when resolution of the dispute was not necessary to provide relief to the Plaintiff prisoner class in a local jail?

2. Whether a federal court's order, based solely on state law, that the state must compensate one of its political subdivisions is in violation of the Eleventh Amendment when such order is not necessary to provide relief to the prisoner class in a local jail?

3. Whether, under principles of federalism, federal courts should abstain from deciding, or, alternatively, certify to the Texas Supreme Court, unsettled questions of state law involving a dispute between two levels of state government concerning state fiscal policy and a complex state regulatory scheme, when federal judicial intervention in the dispute is not necessary to provide relief to the Plaintiff prisoner class in a local jail and a state court proceeding involving identical issues and identical parties is pending?

4. Whether state officials who have no supervisory responsibility over local jails can be held liable for unconstitutional conditions in a local jail under *Wilson v. Seiter,* ____ U.S. ____, 111 S.Ct. 2321 (1991) because they (1) did not construct or acquire additional capacity in the state prison system beyond that appropriated for by the state legislature and (2) did not further expedite the release of convicted felons in the state prison system, given a context of unsettled state law on their responsibility (if any) for convicted felons in local jails and federal court orders limiting the use of state prison capacity?

5. Whether, under principals of federalism, a federal district court abuses its discretion in setting a constitutional cap in a local jail at design capacity pursuant to state law and previous consent decrees without adopting a "wait-and-see" approach to determine whether, in operating beyond design capacity, jail officials will be deliberately indifferent to the significant human needs on the inmate class?

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No. 91-1202

In the
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Ann Richards, Governor of Texas, et al.

Petitioners

v.

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Respondents

v.

Lawrence R. Alberti, et al.

Respondents

On Petition for Certiorari
To the United State Court of Appeals
For the Fifth Circuit

Respondents' Brief in Opposition

The respondents, a class of inmates within the Harris County, Texas jail system respectfully request that this Court deny the petition for writ of certiorari seeking review of the Fifth Circuit's opinion in this case which is reported at 937 F.2d 984 (5th Cir. 1991).

Statement of the Case

Petitioners' statement of the case omits relevant facts and is in some respects inaccurate. Rather then burden the court with another statement, respondents adopt Judge Higginbotham's presentation in *Alberti v. Sheriff of Harris County, Texas,* 937 F.2d 984, 986-992 (5th Cir. 1991) which avoids those deficiencies.

Summary of Argument

Petitioners present five question for review. The first three are directed to the federalism/abstention vortex and have been either rendered moot or have been greatly diminished in importance by virtue of legislation enacted after the circuit court's decision. The relief petitioners sought, resolution of the parties' responsibilities "on the terra firma of Texas Politics in the Texas legislature," has indeed occurred. There are no longer unsettled questions of state law to sustain a controversy.

There is no conflict of opinions between the circuits. The *Alberti* panel easily distinguished the claimed conflicting case on the facts and petitioners have not attempted to explain or dispute the *Alberti* panel's distinction.

Petitioners seek review of a question related to application of the *Wilson v. Seiter* indifference standard; however, this question was not decided by the circuit court, but was instead remanded to the lower court. Thus there is no circuit court opinion to be reviewed on

this issue, and without a decision, of course there can be no conflict with other circuits.

Finally, petitioners seek review of the question: "Whether, under principles of federalism, it is an abuse of discretion in setting a constitutional cap in a local jail at design capacity pursuant to state law and previous consent decrees without adopting a 'wait and see' approach to determine whether, in operating beyond design capacity, jail officials will be deliberately indifferent to the significant human needs of the inmate class." This question is not properly before the Court for review because it was not an issue presented to the court of appeals.

Reasons for Denying the Writ

I. NO IMPORTANT ISSUE OF FEDERAL LAW IS PRESENTED BY THE PETITION.

A. MANY OF THE QUESTIONS PRESENTED BY THE PETITION EITHER ARE MOOT OR ARE OF GREATLY DIMINISHED IMPORTANCE DUE TO ENACTMENT OF LEGISLATION AFTER THE CIRCUIT COURT DECISION

The first question presented is whether "federal courts have jurisdiction to decide unsettled questions of state law involving two levels of state government concerning state fiscal policy and a complex regulatory scheme." Petition for Writ of Certiorari p. i (hereafter, "Petition"). However, petitioners only contend that the law was unsettled prior to August of 1991. Petition p. 6.

That is before the Texas legislature enacted HB 93[1] which clarified the relation of the duties and responsibilities of the state and counties for housing prisoners. Petition pp. 10-11.

Now that these relations have been determined and the previously heated litigation is no longer pending, the importance of this question is greatly diminished and the questions raised in the circuit court have been mooted.

Whatever this court might decide it would not affect the present and future continuing legal status (which has been determined by HB 93) of the parties. At most, it could only be applied to a an earlier relation which is of little or no present importance because there is no longer a state regulatory scheme involved or a significant question of fiscal policy presented. The old scheme, which would be before the court if certiorari were granted, was discarded by HB 93 almost a year ago and the issues raise by the earlier scheme are now moot.

Petitioners' second question presented (whether an order based solely on state law, that the state must compensate one of its political subdivisions) and third three (whether federal courts should abstain from deciding unsettled questions of state law involving a dispute between two levels of state government) suffer a similar infirmity. These questions depend, for their vitality, upon there being unsettled state law. Now that

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[1] Vernon's Tex. Sess. Laws 1991, 2d Called Sess., Ch. 10, pp. 180-226 (hereafter, "HB 93")(Eff. August 29, 1991).

the legislature has acted to delineate the parties duties and liabilities there is no longer the driving force to generate significant controversy.

The importance of this legislative enactment cannot be overstated. Petitioners' opening statement attaches national significance of these questions and highlights the overriding importance of HB 93 by underscoring their basic contention that these matters were not for federal courts but "should only have been resolved on the terra firma of Texas politics in the Texas legislature." (Emphasis supplied). Petition p. 4. But this is exactly what the state has gotten in HB 93 and is precisely why their questions are moot and/or unimportant and inappropriate for certiorari.

Also, under these circumstances, to grant certiorari could unsettle the rules pertaining to mootness, standing, case and controversy, or cause an unnecessary foray by the Court into these areas before petitioners' questions are reached.

B. THERE IS NO CONFLICTING CIRCUIT COURT OPINION

Petitioners assert there is a conflict between the *Alberti* opinion and that of *Kelly v. Metropolitan County Board of Education of Nashville and Davidson County, Tennessee v. State of Tennessee,* 836 F.2d 986 (6th Cir. 1987), *cert. denied*, 487 U.S. 1206 (1988). However Judge Higginbotham easily distinguished the two cases:

Kelly, cited extensively by the state, is

> distinguishable —the order remedying the violation in *Kelly* ran only against the county, and the state was not a current constitutional violator, yet the county sought reimbursement from the state for the costs of the remedial order.
>
> *Alberti*, 937 F.2d at 1001.

Surprisingly the petitioners fail to address this distinction. While petitioners go to great length asserting the two cases are in conflict, they neither dispute nor explain the panels explicitly distinguishing the two cases on the facts. Surely the petitioners were familiar with the panel decision and would have addressed the point raise by Judge Higginbotham if there were an effective response. Petitioners silence is tantamount to an admission that the distinction is valid and that the cases are materially different on the facts. There is no conflict that requires resolution by this Court.

C. THE *WILSON V. SEITER*-INDIFFERENCE QUESTION WAS REMANDED AND IS NOT BEFORE THE COURT.

Petitioners ask this Court to grant certiorari to consider a fourth question: "Whether state officials who have no supervisory responsibility over local jails can be held liable for unconstitutional conditions in a local jail under *Wilson v. Seiter*, ____ U.S. ____, 111, S.Ct. 2321 (1991) because they (1) did not construct or acquire additional capacity in the state prison system and (2) did not further expedite release of convicted felons given a context of unsettled state law on their responsibility (if

any) for convicted felons in local jails and federal court orders limiting the use of state prison capacity." However, this question was not decided by the circuit court, but was remanded to the trial court for further findings because *Seiter* had been decided between the time the trial court ruled and the appeal was heard. *Alberti*, 937 F.2d at 993 and 1004.

An element in determining whether a question is worthy of certiorari is the finding of conflicting opinions between the circuits. This requirement assures a full development of the issues so that this court will not need to revisit the area due to failure of the briefs and argument to maturely develop all pertinent matters. But here there is not an opinion from the circuit court much less the development of a conflict. Certiorari is an inefficient use of the Court's time when the issue is unseasoned and not ripe for review.

D. WHETHER FEDERALISM REQUIRES A COURT TO IMPLEMENT A REMEDY PIECEMEAL BY "WAIT AND TO SEE" IF JAIL OFFICIALS WILL BE DELIBERATELY INDIFFERENT, WAS NOT AN ISSUE PRESENTED TO THE COURT OF APPEALS AND THEREFORE IS NOT PROPERLY BEFORE THIS COURT

Petitioners' last question for consideration is "whether, under principles of federalism, a federal district court abuses its discretion in setting a constitutional cap in a local jail at design capacity pursuant to state law and previous consent decrees without adopting a "wait-and-see" approach to determine

whether, in operating beyond design capacity, jail officials will be deliberately indifferent to the significant human needs of the inmate class." The question was not presented to the circuit court as is demonstrated by an examination of petitioners' circuit court brief's Statement of Issues.[2] For convenience this statement is set out in

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[2] Statement of Issues in Court of Appeals Brief of State Appellants Ann Richards, The Governor of Texas, Et Al. at p. 1:

STATEMENT OF ISSUES

The issues presented for review are as follows:

1. Whether the lower court had jurisdiction to decide the case:
(a)
. . .
(d)

2. Whether assuming the lower court had jurisdiction it should have abstained from exercising it under principles of federalism?
(a)
. . .
(e)

3. Whether under State and federal law State Defendants are liable?
(a)
. . .
(d)

4. Whether there is procedural error justifying reversal?
(a)
. . .
(e)

5. Whether the *Alberti* court erred as matter [sic] of law in ruling that the constitutional capacity of the Harris County jail is its design capacity and whether there is sufficient evidence to show this?

6. Whether the *Alberti* court violated this Court's decision in *In*

the margin.

It is difficult at best to respond to a question not previously raised,[3] e.g., there has been no record

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Re: Clements, 881 F.2d 145 (5th Cir. 1989) by unilaterally ordering State Defendants to deposit $750,000 in the court registry to defray the cost to Harris Count of transferring prisoners from the Harris County jail to detention facilities in other counties?

7. Whether the *Ruiz* court has under *Clements* or should be given complete control over all remedies against State Defendants including any award of costs, attorneys fees and sanctions (assuming that State Defendants remain in this case after this appeal is decided)?

8. Whether the *Ruiz* court should be given complete control over all population issues relating to the Harris County jail (assuming that State Defendants remain in this case after this appeal is decided)?[1]

[1][Footnote in Original] Issues 6-8 have already been fully briefed in State Defendants' Petition for a Writ of Mandamus, etc.. This Briefing will not be repeated here but is adopted and incorporated by reference herein.

[3] The panel did response to the most analogous question petitioners did raise — whether court erred as matter of law in ruling constitutional capacity is design capacity, No. 5 above — by stating that the lower court's "findings contemplated a number of factors in addition to design capacity —the fact that thousands of inmates were sleeping on the floor, the physical design of the cellblocks, the inability of the staff to control inmates, the increase in disciplinary violations, plumbing problems, poor ventilation, the absence of a sprinkler system or a second means of egress in the event of a fire, supply shortages, insufficient food service, inadequate medical care, and the outbreak of a pneumococcal infection. In sum, then, the finding was not clearly erroneous." *Alberti* 937 F.2d at 1000-1001. Petitioners wrongly characterize this issue as a question of law and not fact. Both the trial court and circuit court treated that question as evidentiary in nature, one which depends on the particular facts of the case.

developed. Such a question surely would not be the meet the thrust of Rule 17.1(a)[4] reasons for granting review. The enumerated provisions therein have a common denominator in that all address a court of appeals decision, whether the opinion be in conflict with one another, with a state court of last resort, or be one which has far departed from the accepted and usual course of judicial proceeding. All these are premised on there being an appeals court decision, but when a question has not been presented below there is not going to be an opinion addressing it — even by silence. Therefore review of such a question should be denied.

II. THERE ARE OTHER SUFFICIENT REASONS FOR THE COURT TO DENY THE PETITION

A. The Lower Courts Reached a Fair and Correct Conclusion

Judge Higginbotham's well reasoned opinion for a unanimous panel reached a fair and correct result. The essential problem that all of the forums, state and federal, addressed is whether the state should bear some of the burden for housing inmates they were refusing to accept. The response in every forum has been affirmative.

A further complicating factor is that petitioners do not operate these jails and any recommendations they might have changing operations would be merely advisory.

[4] Supreme Court Rules.

Petitioners' failure in federal court has been both consistent and frequent as demonstrated by a perusal of orders set out in the Petition's Appendices A - AA. Their losses in federal court were parallelled by those in state court. *County of Nueces v. Texas Board of Corrections,* No. 45,071 (Dist. Ct. of Travis County 250th Judicial Dist. of Texas); *Harris County v. State of Texas*, No. 465,468 (Dist. Ct. of Travis County, 126th Judicial Dist. of Texas). See County Respondents' Appendices A - H.

Even when the matter was taken to their own state legislature, petitioners' position was vanquished. Far from obtaining legislation which adopted petitioners' denial of financial responsibility, the Texas legislature in HB 93 required the state to pay the per diem cost of housing most state-ready inmates in local jails.

III. CONCLUSION

For the above reasons and those set out in the county respondents' opposition, review of the case should be denied and respondents request such other relief which the Court may deem just, fair and equitable.

RESPECTFULLY SUBMITTED,

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No. 91-1202

Supreme Court, U.S.
FILED
MAR 20 1992
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In The

Supreme Court of the United States

October Term, 1991

ANN RICHARDS, GOVERNOR OF TEXAS, et al.,

Petitioners,

versus

JOHN LINDSAY, HARRIS COUNTY JUDGE, et al.,

Respondents,

versus

LAWRENCE R. ALBERTI, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF AMICUS CURIAE FOR THE STATES OF LOUISIANA, ARKANSAS, IDAHO, INDIANA, MISSISSIPPI, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, PENNSYLVANIA, SOUTH DAKOTA AND UTAH, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI BY ANN RICHARDS, GOVERNOR OF TEXAS AND ALL OTHER PETITIONERS

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INTEREST OF THE AMICI CURIAE

The Amici are all States. The various Attorneys General provide legal representation of their respective States. The particular legal questions presented in the Petition for Writ of Certiorari to This Court posit significant, unanswered questions of federalism; the Eleventh Amendment; abstention; liability for unconstitutional conditions in local jails and setting of constitutionally permissible caps on prisons and jails. The answers to the questions presented will have a nationwide impact on litigation requesting remedial injunctive relief from state officials for alleged unconstitutional conditions of confinement in local jails and the authority of lower federal courts to determine matters of political organization of the Several States and matters of fiscal and public policy.

The Amici States urge This Court to grant a Writ of Certiorari in this case and set the matter for argument.

SUMMARY OF REASONS FOR GRANTING THE WRIT

In the instant case, the Fifth Circuit violated the principles of federalism and Article III of the Constitution when it served as arbitrator of a dispute between the State of Texas and its local governmental entity (Harris County). The Fifth Circuit violated the Eleventh Amendment when it determined how the State of Texas should function under the laws of the State of Texas. The failure of the Fifth Circuit to abstain from answering unsettled questions of Texas state law violates the principles of "Our Federalism" contained in the Tenth and Eleventh

Amendments. The imposition of liability on Texas State Officials for violations of the Cruel and Unusual Punishment Clause of the Eighth Amendment by Harris County Officials over whom the Texas State Officials had no authority or control under state law, violates This Court's standard of culpability set out in *Wilson v. Seiter,* ___ U.S. ___, 111 S.Ct. 2321 (1991) and the requirement of causal connexity under 42 U.S.C. § 1983. When the Fifth Circuit set constitutional caps on the local jail based on the design capacity of Harris County Jail and previous consent decrees, and without waiting to see if operating the jail beyond design capacity caused jail officials to be deliberately indifferent to the significant human needs of the inmate class, it violated the legal standard set out under *Wilson v. Seiter,* and the principles set out in *Rufo v. Inmates of Suffolk County Jail,* ___ U.S. ___, 112 S. Ct. 748 (1991) The Fifth Circuit also violated the principles of "Our Federalism" when it used design capacity and Texas state law in setting population caps in the Harris County Jail.

Amici does not feel that the federal courts can sweep away the substance of state law, settled or unsettled, or create state law on the one hand, while on the other hand claiming to follow state law in finding a federal constitutional violation. In the instant case the Fifth Circuit swept away Texas state law in regard to imposing a remedy, created new Texas state law in terms of determining the identity of constitutional violators, and then claimed it relied on Texas state law in finding a violation of the Cruel and Unusual Punishment Clause of the Eighth Amendment. Amici asserts that, in this regard, the opinion of the Fifth Circuit was incorrect. This Court should correct the errors committed by the Fifth Circuit

so that these errors will not be repeated in the Fifth or any other Circuit. Clear guidance is needed on the issues raised in the Petition for Writ of Certiorari.

The opinion of the Fifth Circuit violates provisions of the Constitution as well as prior opinions of This Court. It also creates a conflict among the circuits. The issues raised in the Petition for Writ of Certiorari affect the jurisdiction of federal courts, our federal system of government, and every State. Therefore, there exists special and important reasons for granting the writ.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO RESOLVE AN IRRECONCILABLE CONFLICT BETWEEN THE CIRCUITS OVER (1) THE ROLE OF FEDERAL COURTS IN DECIDING DISPUTES BETWEEN DIFFERENT LEVELS OF STATE GOVERNMENT AND (2) THE SCOPE OF THE TENTH AND ELEVENTH AMENDMENTS.

Amici agree with the reasons for granting writ asserted in the petition.[1] These reasons will not be reasserted here.

In the instant case, the Fifth Circuit interjected itself into the center of a political dispute between the Legislature of Texas and the counties of Texas over which political entities within Texas should bear the costs associated

[1] See: Petition for Writ of Certiorari pp. 13-18.

with housing convicted felons.[2] The Fifth Circuit, in its opinion, resolved this political dispute to the advantage of Harris County. The federal court's authority to determine the existence of an Eighth Amendment violation exists; however, the Fifth Circuit had no authority to resolve the dispute between the State of Texas and its local governmental entities.

The Constitution does not dictate to the States the type of governmental structure which must be established by a State. This includes the relationship with its own local governmental entities.[3] Federal courts are simply not granted the authority under Article III of the Constitution "to adjudicate an internal dispute between a local governmental entity and the very State that created

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[2] The procedural history and facts of the instant case are outlined in the Petition for Writ of Certiorari at p. 4-13 and will not be repeated here. It is, however, important to note that Harris County Officials, who were the original defendants in the District Court, brought the Texas State Officials into federal court on a Third Party Complaint. The plaintiff inmate class did not sue the Texas State Officials on their original complaint in the District Court. *Id.* pp. 4-5.

[3] The Constitution only requires that the States have a republican form of government. Neither Congress nor the federal courts can dictate to the Several States how to organize their internal governmental structures either on a statewide basis or the relationship between a State and its local governmental entities. See: *Coyle v. Smith,* 221 U.S. 559 (1911). The Tenth Amendment reserves to the Several States the authority to structure themselves. See: *Coyle v. Smith,* 221 U.S. 559 (1911) and *Presley v. Etowah County Commissioners,* ___ U.S. ___, 112 S.Ct. 820, 832 (1992).

it." *Kelley v. Metropolitan Board of Education of Nashville and Davidson County, Tennessee,* 836 F.2d 986, 998 (6th Cir. 1987), *cert. denied,* 487 U.S. 1206 (1988). Since a local entity is a creation of a State, the local entity lacks standing to sue its creator State in federal court. A State cannot sue itself in federal court.[4] How a State organizes and structures itself is guaranteed to the Several States in the Tenth Amendment. Since a governmental entity's ability to organize and structure itself is an act of sovereign authority of that entity, a federal court is prohibited from adjudicating a dispute between a State and its local governmental entities. See: *Presley v. Etowah County Commissioners,* ___ U.S. ___, 112 S.Ct. 820, 832 (1992).[5]

This case involved the fiscal and taxing policies, public safety and local initiatives in regard to the criminal justice system in Texas. It is clear that a finding of liability and the issuing of injunctive relief did not require that

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[4] See: *Coleman v. Miller,* 307 U.S. 433, 441 (1939); *South Macomb Disposal Authority v. Township of Washington,* 790 F.2d 500 (6th Cir. 1986); *Town of Ball v. Rapides Parish Police Jury,* 756 F.2d 1049, 1051 N.1 (5th Cir. 1984) (and cases cited therein)

[5] Federal Courts are prohibited by the Eleventh Amendment from instructing state officials on how to comply with state law because that would "conflict" directly with the principles of federalism that underlie the Eleventh Amendment. *Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89, 106 (1984). Allowing a federal court to dictate a State's relationship with its local governmental entities would cause an even greater conflict with the principles of federalism that underlie the Eleventh Amendment.

Texas State Officials be brought into the lower court.[6] Relief could have been obtained from the Harris County Officials, who under Texas state law, were the physical custodians of the plaintiff inmate class. The issuance of injunctive relief, which ordered the State of Texas to pay Harris County, clearly interfered with the governmental structure in Texas.

That portion of the injunction was based solely on the Fifth Circuit's interpretation of Texas state law and was not necessary in order to preserve a federal right. This Court has determined that federal courts should not interfere in the rightful independence of state government in the absence of vindicating a federally protected right. See: *Great Lakes Dredge & Dock Co. v. Huffman,* 319 U.S. 293, 298 (1943) In this case, the Fifth Circuit interfered in the fiscal relationship between the Legislature of Texas and the government of Harris County. The remedy could have been obtained solely

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[6] Officials of the State of Texas were brought into this suit by the county that it created in order to protect the fiscal interest of Harris County at the expense of the State of Texas. See: footnote 2, *supra.*

The officials of the State of Texas were sued in order to seek prospective injunctive relief. This type of suit is clearly a suit against the Texas State Officials in their official or representative capacities. See: *Will v. Michigan Department of State Police,* 491 U.S. 58, 71 N.10 (1989) As such the Harris County Officials third partied the State of Texas into this suit in federal court. See also: *Hafer v. Melo,* ___ U.S. ___, 112 S.Ct. 358, 361-362 (1991) and *Kentucky v. Graham,* 473 U.S. 159, 165-166 (1985)

from Harris County, leaving it to Harris County to seek redress of its fiscal problem with the Texas State Legislature or in a Texas State Court.

The Fifth Circuit ruling in the instant case and the case of *Benjamin v. Malcolm,* 803 F.2d 46 (2nd Cir. 1986) conflict directly with the holdings of This Court in *Pennhurst State School & Hospital v. Halderman* and the case of *Kelley v. Metropolitan Board of Education of Nashville and Davidson County, Tennessee.* There exists a conflict among the circuits and a conflict with an opinion of This Court which should be resolved through the granting of this writ.

The Fifth Circuit in its opinion resolved a dispute between Harris County and the State of Texas. See: *Alberti v. Sheriff of Harris County,* 937 F.2d 984, 993-998 (5th Cir. 1991) This violates the Tenth Amendment and Eleventh Amendment of the Constitution, exceeds a federal court's authority under Article III of the Constitution, and causes a conflict among the Circuit Courts. The resolution of this issue by This Court is of great importance to every State and local government in this country. For these reasons the writ should be granted.

II.

CERTIORARI SHOULD BE GRANTED BECAUSE OF THE LOWER COURT'S CLEARLY ERRONEOUS AND ILL REASONED RULING ON ABSTENTION

Amici agree with the Petitioner's reasons for granting writ on the issue of abstention.[7] These reasons

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[7] See: Petition for Writ of Certiorari pp. 18-23.

will not be reasserted here. Amici assert that whether the doctrine is abstention, Article III jurisdiction, or Our Federalism under the Tenth or Eleventh Amendment, the Fifth Circuit, like all federal courts, neither has the authority nor background to adjudicate questions of state law.

It is clear in this case that the state law issue of whether the State of Texas owed money to Harris County for housing transfer eligible inmates was an unsettled question of Texas state law.[8] Article III of the Constitution permits federal courts to adjudicate only certain claims; determining questions of state law is not one of the type of claims listed in Article III.[9] The Tenth Amendment leaves to the Several States the sole authority to adjudicate such state law claims in their state courts. The Eleventh Amendment prohibits federal courts from adjudicating issues of state law solely on state law grounds. See: *Pennhurst State School & Hospital v. Halderman*, 465 U.S. at 106.

It is clear that the Fifth Circuit should have "abstained" from adjudicating the unsettled question of Texas State law, stayed the proceedings in federal court on that issue and certified the question to the state court

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[8] See: Petition for Writ of Certiorari pp. 6-11.

[9] This claim is not based on diversity but rather on a federal claim. While matters involving state law might arise in a diversity case, only the constitutionality of a state law can be considered as arising under a federal claim. Here the issue was not the constitutionality of the state law in question but rather an actual adjudication of what that state law means.

system in Texas. See: *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 9-22 (1987) Since the issue at stake is purely a matter of state law, and the federal question could have been resolved without answering the state law question, the state law issue should have been dismissed along with the state defendants. See: *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-820 (1976) *New Orleans Public Service, Inc. v. Counsel of City of New Orleans*, 491 U.S. 350, 360-362 (1989) and *Mississippi Power & Light Co. v. Mississippi ex rel Moore*, 487 U.S. 354, 108 S.Ct. 2428 (1988)

The reasons why federal courts should not adjudicate state law claims are grounded both in the Constitution and practicality. This Court has pointed out that federal judges are not necessarily schooled or learned in state law. See: *Pennhurst State School & Hospital v. Halderman*, 465 U.S. at 123 N.32.

In this case, the Fifth Circuit based its analysis of Texas state law on an opinion by a Texas State District Judge located in Harris County. *Alberti v. Sheriff of Harris County*, 937 F.2d at 997. This state court opinion, however, was never final nor was it reviewed by any higher court in Texas. In fact this state court opinion has been vacated.[10]

Because of the above misinterpretation of unsettled Texas state law by the Fifth Circuit, this case is a textbook example of the practical reason why federal courts should not adjudicate purely state law claims. A federal court should either; (1) "abstain" from adjudicating these types

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[10] See: Petition for Writ of Certiorari pp. 9-10.

of claims; (2) certify them to the appropriate state court system; or (3) dismiss the claims.

This Court should grant writs on these questions because it is an important issue of nationwide significance and has not received uniform application throughout the federal court system.

III.

THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE IF, IN THE CONTEXT OF UNSETTLED STATE LAW AND FEDERAL COURT ORDERS IN THE STATE PRISON CONDITIONS CASE, STATE OFFICIALS WITH NO SUPERVISORY AUTHORITY OVER LOCAL JAILS ARE LIABLE UNDER *WILSON V. SEITER* FOR CONDITIONS OF CONFINEMENT IN A LOCAL JAIL BECAUSE THEY (1) DID NOT CONSTRUCT OR ACQUIRE MORE BEDS THAN THE LEGISLATURE APPROPRIATED FUNDING FOR AND (2) DID NOT EXPEDITE THE RELEASE OF MORE CONVICTED FELONS.

Amici agree with the Petitioners' reasons for granting writ on this question.[11] These reasons will not be reasserted here. Amici assert, however, that contained within the question presented for review is the basic issue of who can be held liable for violating the Constitution under 42 U.S.C. § 1983.[12]

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[11] See: Petition for Writ of Certiorari pp. 23-27.

[12] Petitioners have framed this question in terms of liability under *Wilson v. Seiter*. See Petition for Writ of Certiorari

(Continued on following page)

Under the clear meaning of § 1983 only a "person" who violates another's constitutional rights can be held liable for the violation of a constitutional right. What is equally clear is that a remedy for violating another's Constitutional rights can be issued only against the "person" who violated that right. See: 42 U.S.C. § 1983 and See: *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 818-821 (1985) (Per Justice Rehnquist with the Chief Justice and three Justices concurring in judgment).

In the instant case, a remedy for violating the constitutional rights of the plaintiff inmate class was issued against the State Defendants without determining if each of the State Defendants were "persons" liable for the constitutional violation. In short, did the Texas State

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(Continued from previous page)

p. 1 Question Presented Number 4. However, supervisory liability is also an issue under 42 U.S.C. § 1983. See: *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 818-821 (1985) (Per Justice Rehnquist with the Chief Justice and three Justices concurring in judgment) As stated by This Court, questions of the meaning of § 1983 are jurisdictional in nature and can be reviewed by This Court regardless of their being raised by the parties. *Will v. Michigan Department of State Police*, 491 U.S. 58, 63 N.4 (1989)

A federal court's instruction to State Officials on how to comply with state law is barred by the Eleventh Amendment. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. at 196. Pendent Jurisdiction cannot be used to bypass what the Eleventh Amendment specifically prohibits. *Id.*, 465 U.S. at 121-122. Therefore, This Court has already determined that a legal dispute between state officials and county officials cannot be heard as a pendent State law claim.

Officials have responsibility for the unconstitutional conditions of confinement in Harris County's jail?

The "actor" is the "person" liable for violations of constitutional rights. The "actor" who is liable is the "person" against whom the remedy can be imposed under § 1983. A plurality of This Court has indicated that the "actor" in cases like the instant one, is determined by looking at state law. *City of St. Louis v. Praprotnick,* 485 U.S. 112, 123-129 (1988) (Per Justice O'Connor with the Chief Justice and two Justices concurring)

Texas state law made the officials of Harris County the physical custodians of the plaintiff inmate class and, therefore responsible for the care and treatment of the plaintiff inmate class while housed in the Harris County Jail. Tex. Code Crim. Proc. Art. 104.002 (Vernon Supp. 1992). Under Texas state law, the officials of Harris County are the "actors" who are responsible for the conditions of confinement at the Harris County Jail, regardless of whom is housed within that jail.[13] Therefore, the "person" who is liable and against whom a remedy can be imposed are the officials of Harris County and not the Texas State Officials.

However, the Fifth Circuit ignored the clear dictates of Texas state law and determined that a remedy could be imposed against the State Defendants and the County

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[13] See: Petition for Writ of Certiorari pp. 6-11.

Defendants.[14] *Alberti v. Sheriff of Harris County,* 937 F.2d at 993-998. A plurality of This Court has determined that this method is improper. *City of St. Louis v. Praprotnick,* 485 U.S. at 134 N.1, This Court, however, has never determined what method must be used.

In determining who is the "actor" for purposes of imposing liability under § 1983, state law must control. Under § 1983 only the "actor" who is the constitutional violator can have a remedy imposed against him. This concept is neither new nor radical. It is a basic principle of fairness that only wrongdoers can be found liable in court and have remedies imposed on them.

The question of law presented here is: How should a federal court determine who is the "actor" for purposes of imposing liability on and a remedy against a "person" under 42 U.S.C. § 1983? This is a threshold and plenary question under § 1983. This Court should grant writ in this case to resolve this important legal question.

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[14] Louisiana Courts have determined that local jail officials – Parish Sheriff – is the "actor" who is liable for the conditions of confinement at parish jails under Louisiana law and not Louisiana State Officials. La. Rev. Stat. Ann. 15:824, See *Langley v. City of Monore,* 582 So.2d 367, 368 (La. Appl 2nd 1991), *Cooley v. State of Louisiana,* 533 So.2d 124, 125 (La. App. 4th Cir. 1988) and *Amiss v. Dumas,* 411 So.2d 1137 (La. App. 1st Cir. 1982) The Louisiana Legislature has for sometime mandated that the Parish Officials receive payment per day per head for each Louisiana State prisoner that is held in parish jail. La. Rev. Stat. Ann. 15:824B

IV.

CERTIORARI SHOULD BE GRANTED TO REVERSE AN ILL REASONED AND CLEARLY ERRONEOUS RULING OF FEDERAL CONSTITUTIONAL LAW ON CAPACITY LIMITATIONS AND TO PROVIDE GUIDANCE TO THE LOWER COURTS ON THE APPROPRIATE APPROACH TO TAKE IN IMPOSING CAPS ON LOCAL JAILS OR PRISONS.

Amici concur in the argument of the Petitioner.[15] These reasons will not be reasserted here. Amici have no additional reasons why This Court should grant the writ on this question.

CONCLUSION

A writ of certiorari should be granted and this case set for oral argument.

The questions presented for review involve unanswered threshold issues of jurisdiction under Article III, the Tenth Amendment and the Eleventh Amendment which have remained unanswered by This Court. The questions presented for review involve answered issues of abstention and/or certification of state law claims. The questions presented for review reflect conflicts among the Courts of Appeals. The results reached by the Fifth Circuit conflict directly with holdings of This Court. Additionally, the proper test for determining the constitutional violator under § 1983 is of nationwide importance.

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[15] See: Petition for Writ of Certiorari pp. 27-30.

The States Amici believe that the questions presented for review in the Petition for Writ of Certiorari are of grave importance to all States. The States Amici feel that This Court should answer the questions presented for review in the Petition for Writ of Certiorari.

Respectfully submitted by:

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No. 91-1202

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In The

Supreme Court of the United States

October Term, 1991

ANN RICHARDS, Governor of Texas; SELDEN HALE III, MAMIE MOORE PROCTOR, HON. CLARENCE N. STEVENSON, ALLAN B. POLUNSKY, JAMES M. ELLER, F.L. STEPHENS, JERRY H. HODGE, JOSHUA W. ALLEN, SR., ELLEN J. HALBERT, Members, Texas Board of Criminal Justice; JAMES A. LYNAUGH, Executive Director, Texas Department of Criminal Justice,

Petitioners,

vs.

LAWRENCE R. ALBERTI, JIMMY E. COLLINS, HENRY C. LANGER, JOSE J. PINA, II, PAT REED, WESLEY SELLERS, individually and on behalf of all others similarly situated,

Inmate Respondents,

-and-

JOHN LINDSAY, HARRIS COUNTY JUDGE; EL FRANCO LEE, JIM FONTENO, STEVE RADACK, JERRY EVERSOLE, Harris County Commissioners; JOHNNY KLEVENHAGEN, Harris County Sheriff,

County Respondents.

On Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit

COUNTY RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondents Harris County Judge Jon Lindsay, Harris County Commissioners El Franco Lee, Jim Fonteno, Steve Radack and Jerry Eversole ("County Respondents") do not concur with Petitioners' statement of "Questions Presented." County Respondents urge that the following constitutes an accurate presentation of the substantive questions presented by Petitioners in their Petition for Writ of Certiorari:

1. Whether a federal district court is authorized to fashion a remedy upon finding violations of constitutional rights?

2. Whether the Eleventh Amendment Shields state officials acting contrary to the United States Constitution from prospective injunctive relief ordered by a federal district court because of ancillary costs.

3. Whether a federal district court can rely on the pronouncement of state law by a state trial court to fashion a remedy.

4. Whether a federal district court abuses its discretion by refusing to abstain when state law is clear and important constitutional rights are at issue.

5. Whether the Supreme Court should grant certiorari on an issue that is not ripe and presently pending in the Fifth Circuit, whose decision may moot any questions now presented.

6. Whether the Supreme Court should grant certiorari on the issue of the constitutional capacity of a county jail facility when the party seeking the writ lacks standing to complaint. complain.

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No. 91-1202

In The

Supreme Court of the United States

October Term, 1991

ANN RICHARDS, Governor of Texas; SELDEN HALE III, MAMIE MOORE PROCTOR, HON. CLARENCE N. STEVENSON, ALLAN B. POLUNSKY, JAMES M. ELLER, F.L. STEPHENS, JERRY H. HODGE, JOSHUA W. ALLEN, SR., ELLEN J. HALBERT, Members, Texas Board of Criminal Justice; JAMES A. LYNAUGH, Executive Director, Texas Department of Criminal Justice,

Petitioners,

vs.

LAWRENCE R. ALBERTI, JIMMY E. COLLINS, HENRY C. LANGER, JOSE J. PINA, II, PAT REED, WESLEY SELLERS, Individually and on behalf of all others similarly situated,

Inmate Respondents,

and

JOHN LINDSAY, HARRIS COUNTY JUDGE; EL FRANCO LEE, JIM FONTENO, STEVE RADACK, JERRY EVERSOLE, Harris County Commissioners; JOHNNY KLEVENHAGEN, Harris County Sheriff,

County Respondents.

On Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit

COUNTY RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

County Respondents do not agree with Petitioners' summary of the opinions rendered below, which mischaracterizes two of the underlying district court and Fifth Circuit orders as orders granting Harris County "compensation."[1] In addition, Petitioners failed to include the state court opinions upon which the United States District Court for the Southern District of Texas partially based its prospective injunctive remedial relief, and upon which the Fifth Circuit affirmed that relief.[2] These opinions are included in Respondents' Appendices A-H.

TEXAS CONSTITUTIONAL AND STATUTORY PROVISIONS OMITTED BY PETITIONERS

County Respondents do not concur with Petitioners' list of constitutional and statutory provisions relating to this case. Petitioners have omitted numerous provisions which the state courts of Texas have construed in finding that Petitioners have a duty to accept convicted felons sentenced to imprisonment in

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1. Petitioners' Petition for Writ of Certiorari (hereinafter "Petition") at 1.

2. The lower courts' orders were also based upon Texas statutes which, *inter alia*, require that convicted felons shall be imprisoned in the state penitentiary. Tex. Penal Code Ann. § 12.31(a) (Vernon Supp. 1992); Tex. Penal Code Ann. § 12.32(a) (Vernon Supp. 1992); Tex. Penal Code Ann. § 12.33(a) (Vernon 1974); Tex. Penal Code Ann. § 12.34(a) (Vernon Supp. 1992); Tex. Penal Code Ann. § 12.42 (Vernon 1974 & Supp. 1992); Tex. Crim. Proc. Code Ann. art. 42.09 §§ 1-4 (Vernon Supp. 1992); Tex. Rev. Civ. Stat. Ann. art. 6166r (in effect from 1927 - August 31, 1989) (recodified at Tex. Gov't Code Ann. § 499.006 (Vernon 1990) and later recodified at Tex. Gov't Code Ann. § 500.006 (Vernon Supp. 1992)); Tex. Gov't Code § 493.001 (Vernon Supp. 1992) (formerly Tex. Rev. Civ. Stat. Ann. 4413(401) § 1.02(a)); Tex. Gov't Code Ann. § 494.001(a) (Vernon Supp. 1992) (formerly Gov't Code Ann. § 494.001(a) (Vernon 1990)); Tex. Gov't Code Ann. § 495.004 (Vernon Supp. 1992) (formerly Tex. Gov't Code Ann. § 494.004 (Vernon 1990)). These statutes are attached as County Respondents Appendix L.

the Texas Department of Criminal Justice-Institutional Division (hereinafter "TDCJ-ID"). County Respondents supplement Petitioners' list with the following state constitutional and statutory provisions: Tex. Const. art. VIII, § 1-a (Vernon Supp. 1992); Tex. Penal Code Ann. § 12.31(a) (Vernon Supp. 1992); Tex. Penal Code Ann. § 12.32(a) (Vernon Supp. 1992); Tex. Penal Code Ann. § 12.33(a) (Vernon 1974); Tex. Penal Code Ann. § 12.34(a) (Vernon Supp. 1992); Tex. Penal Code Ann. § 12.42 (Vernon 1974 & Supp. 1992); Tex. Crim. Proc. Code Ann. art. 42.09 §§ 1-4 (Vernon Supp. 1992); Tex. Rev. Civ. Stat. Ann. art. 6166r (in effect from 1927-August 31, 1989) (recodified at Tex. Gov't Code Ann. § 499.006 (Vernon 1990) and later recodified at Tex. Gov't Code Ann. § 500.006 (Vernon Supp. 1992)); Tex. Gov't Code § 493.001 (Vernon Supp. 1992) (formerly Tex. Rev. Civ. Stat. Ann. 4413(401) § 1.02(a)); Tex. Gov't Code Ann. § 495.001(a) (Vernon Supp. 1992) (formerly Tex. Gov't Code Ann. § 494.001(a) (Vernon 1990)); Tex. Gov't Code Ann. § 495.004 (Vernon Supp. 1992) (formerly Tex. Gov't Code Ann. § 494.004 (Vernon 1990)). These provisions are reproduced in County Respondents' Appendix L.

STATEMENT OF THE CASE

County Respondents adopt the factual and procedural history set forth by the Fifth Circuit in its July 25, 1991 opinion, which is substantially accurate.[3] Petitioners' Petition is rife with misstatements of the facts and law relating to this case. Even after the Fifth Circuit's opinion memorialized several instances where Petitioners mischaracterized the holdings of the United States District Court for the Southern District of Texas in this case,[4]

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3. *See Alberti v. Harris County*, Petitioners' Appendix at A1-A15, A18-A19, A24-A25.

4. *See, e.g., Alberti v. Harris County*, Petitioners' Appendix at A34-A35 & n. 8.

Petitioners appear before this Court, mischaracterizing the nature of this suit, as well as the action taken by the district court and by the Fifth Circuit.

For example, the opening paragraph of Petitioners' "Statement of the Case" took three words used by the Fifth Circuit in its *Alberti* opinion out of context and thereby misstated the foundation of the Fifth Circuit's opinion. According to Petitioners' Petition:

> This controversy swirls around whether Texas prison officials and the Governor of Texas [hereinafter "Petitioners"] bore any liability, especially financial liability, for felons sentenced to the state prison system but confined and maintained in the Harris County jail. [Petitioners] do not dispute the Fifth Circuit's analysis that this is "*exclusively*" a state law issue and that it presented a "*hard question*" for the court.[5]

Contrary to Petitioners' representations, the Fifth Circuit did not find that Petitioners' liability "exclusively" presented a state law issue which in turn presented a "hard question" for the court. Drawing from the Fifth Circuit's decision in ***Bush v. Viterna***, Judge Higginbotham outlined the three-pronged analysis undertaken by the Fifth Circuit when enforcing constitutional standards under 42 U.S.C. § 1983:

> Whenever a plaintiff alleges a cause of action under § 1983, a federal court must ask three questions. First, is a federal secured right involved . . . . Second, was the alleged deprivation of the right

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5. Petitioners' Petition at 3 (emphasis in Petition), citing *Alberti v. Sheriff of Harris County*, Petitioners' Appendix at A18. *See also*, Petitioners' Petition at 4, 14, 17 & 18-19.

> accomplished by state action? . . . Finally, who is the state actor responsible for the violation? *Unlike the first two questions*, the third question turns *exclusively* on state law . . . . The hard question in this appeal is the third question, the issue of who is liable for the conditions in the county's jails.[6]

Petitioners' representations, in contrast, raise the *Pennhurst*[7] specter while ignoring the first two questions outlined by the Fifth Circuit, ignoring the Fifth Circuit's analysis of their liability for deprivations of Respondents' federal constitutional rights under *Stewart v. Winter, Benjamin v. Malcolm*, and *Tate v. Frey*,[8] and ignoring the Fifth Circuit's explicit rejection of their contention that their duties only arose pursuant to state law.[9]

Alberti is neither a suit seeking the recovery of monetary damages, a suit between different levels of state government,[10]

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6. *Alberti v. Sheriff of Harris County*, Petitioners' Appendix at A-18 (emphasis added in part), citing *Bush v. Viterna*, 795 F.2d 1203, 1208 (5th Cir. 1986).

7. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 104 S. Ct. 900, 97 L. Ed. 2d 67 (1984).

8. *Alberti v. Sheriff of Harris County*, Petitioners' Appendix A18-A26, A34-A35, citing, *Stewart v. Winter*, 669 F.2d 328 (5th Cir. 1982); *Benjamin v. Malcolm*, 803 F.2d 46 (2d Cir. 1986), *cert. denied sub nom, Cuomo v. Koehler*, 480 U.S. 910, 107 S. Ct. 1358, 94 L. Ed. 2d 528 (1987); *Tate v. Frey*, 735 F.2d 986 (6th Cir. 1984). *Compare* Petitioners' Petition at 1-2.

9. *Alberti v. Sheriff of Harris County*, Petitioners' Appendix at A34.

10. Petitioners' Petition at 15-17. On virtually every page of their Petition, Petitioners attempted to portray *Alberti* as a case between two governmental entities, rather than a case in which they were found liable for violations of

(Cont'd)

nor a suit based upon Petitioners' violations of state law.[11] Instead, this is a class action civil rights case filed in 1972 under 42 U.S.C. § 1983 and the Eighth and Fourteenth Amendments by pretrial and convicted misdemeanants and felons incarcerated in the Harris County jail facilities (hereinafter "Inmate Respondents"), contesting the conditions of their confinement.

In February, 1987, County Respondents filed a motion for Final Judgment in *Alberti,* urging that they were in compliance with the district court's remedial orders and that the conditions of confinement in the jail facilities were constitutional. After reviewing the facilities, court-appointed monitors determined that "as of June 1, 1987, the County's facilities were five percent over capacity."[12] Citing County Respondents' renovation of their 301 San Jacinto Jail facility, construction of a new 4,000-bed downtown jail, and design of a Criminal Justice Center, the *Alberti* monitors stated, "[u]nlike most jurisdictions around the country prodded to reform by judicial intervention, the defendants are not content to rest on their laurels until the next crisis emerges, but instead have moved aggressively and efficiently to anticipate

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(Cont'd)
Respondent's Eighth Amendment rights. The Fifth Circuit succinctly addressed this argument, stating: "The state also makes a general federalism argument, suggesting that '[a] federal court has no jurisdiction (no power) to act as arbiter between different levels of a State's government that are in dispute.' Again, this argument mischaracterizes the action; the state is responsible for a federal constitutional violation." *Alberti v. Sheriff of Harris County,* Petitioners' Appendix at A35 n. 8.

11. *See, e.g.,* Petitioners' Petition at 1, 3-6, 10, 11, 14 & 24. The sheer number of misstatements made in Petitioners' "Statement of the Case," as well as the balance of their Petition, has compelled County Respondents to address them in a separate section, under roman numeral "V."

12. *Alberti* Monitors' Oct. 7 1987 Findings & Recommendations at 28.

future needs."[13] According to the monitors, "[w]hile the task is not yet complete, the distance already covered [by County Respondents] is vast, and a finish line is discernable."[14]

Since September, 1987, however, Petitioners have refused to timely accept convicted felons ready for transfer (hereinafter "prison-ready felons") into the state prison system, thereby causing severe overcrowding in the Harris County Jail facilities. In 1989, Inmate Respondents and County Respondents joined Petitioners as Defendants and Third Party Defendants in their official capacities in the *Alberti* case, seeking to enjoin Petitioners to remove all prison-ready felons from the Harris County Jail facilities, and to continue thereafter to remove them. Neither Inmate Respondents nor County Respondents sought any monetary relief from Petitioners.[15] Petitioners' Petition does not even mention that Respondents sued them directly for constitutional violations.

After a bench trial in August, 1989, and hearings in September, 1989, the district court issued its September 25, 1989 Findings of Fact and Conclusions of Law, finding that Petitioners caused and were responsible for the overcrowding in the Harris County Jail facilities — the essential element in its finding that the jail facilities were unconstitutional. In particular, the district court held that "extreme overcrowding is the primary cause of the conditions of confinement listed below that inmates must endure at the Harris County Jail facilities," that Petitioners "caused the overcrowding crisis in the Harris County Jail facilities," that the jail "conditions are cruel and unusual in violation of Plaintiffs' Eighth and Fourteenth Amendment rights,"

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13. *Alberti* Monitors' Oct. 7, 1987 Findings & Recommendations at 80-81.

14. *Alberti* Monitors' Oct. 7, 1987 Findings & Recommendations at 92.

15. County Respondents' Appendix at I & J.

that Petitioners' refusal to accept convicted felons ready for transfer to TDC has caused those inmates to suffer cruel and unusual punishment in the Harris County Jail facilities," and that Petitioners' "refusal to accept all convicted felons ready for transfer from the jail prevented respondents from fully complying with this Court's orders."[16]

Thereafter, the district court issued the injunctive remedial orders at issue here, requiring both County Respondents and Petitioners to limit the numbers of county and state prisoners in the Harris County Jail facilities.[17] The details of any necessary reductions in prisoner populations made by County Respondents and Petitioners pursuant to the order were left to the defendants' discretion. On the contrary, the order set caps on both the "county" and "state" prisoner populations in the jail, ordered the transfers of prison ready felons to other county jail facilities if either population exceeded the cap, and imposed liability for the ancillary costs of those transfers upon the party (either State or County) exceeding its cap.[18] The remedial orders thus gave Petitioners a choice of limiting the prison-ready population within the Harris County Jail facilities to 1,575 prison-ready felons, taking any steps consistent with state law or federal court orders to reduce the prison-ready felon population, or paying the ancillary costs of housing prison-ready felons above their cap in other Texas county detention facilities.[19] Recognizing that County Respondents

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16. Petitioners' Appendix at X4, X17, X22.

17. When citing the district court's February 7, 1991 injunctive remedial order, Petitioners wrongly inferred that they alone bore the burden of any transfers of prison-ready felons to other county jail facilities. Petitioners' Petition at 5.

18. Petitioners' Appendix at R6-R7.

19. Petitioners' Appendix at R6-R8.

and Petitioners, as well as many other Texas counties, were litigating the duty and reimbursement issues in state court, the district court noted that its costs assessment was tentative and preliminary and would be finalized contingent on the outcome of pending litigation.[20]

In *Nueces County v. Texas Board of Corrections* and *Harris County v. Texas,* Judge Joseph Hart rejected each of the arguments Petitioners make in their Petition, and held that Petitioners had a duty to accept prison-ready felons under state law or pay for their upkeep in the county jails.[21] Given Petitioners' failure to timely take their prison-ready felons, the state district courts ordered them to take their prisoners or to reimburse the counties for housing prison-ready felons. After final judgment had been entered in these state lawsuits, the Petitioners settled

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20. Petitioners' Appendix at R7.

21. *See* orders entered in Civil Action No. 452,071; *County of Nueces, Texas, et al. v. Texas Board of Corrections* (250th Judicial District Court of Travis County, Tex.); Civil Action No. 475,468; *Harris County, Texas, et al. v. State of Texas* (126th Judicial District Travis County, Tex.), at County Respondents' Appendix A-H. *See also, Tarrant County Commissioners Court v. Markham,* 779 S. W. 2d 872, 874-75 (Tex. App.-Fort Worth, writ denied 1989) (wherein Texas' Second Court of Appeals observed that "[t]he sad truth is that the State of Texas fails to meet its obligations to incarcerate convicted felons because of the state's settlement agreement in the well known *Ruiz* case . . . the unhappy result is that there are two prison systems in Texas. One is operated 'on the books' by T.D.C. and appears to meet the state's obligations under *Ruiz.* This prison system is financed by the State of Texas out of the state budget. The second prison system is less visible to the public eye; but it exists in increasingly overcrowded county jails. In this system, inmates who have been committed to T.D.C. by state courts are forced to languish in jails of the various counties throughout the state, because of state's failure to accept the inmates committed to T.D.C. . . . These county jails were not designed to house convicted felons who have been committed to T.D.C. for relatively long periods of time.").

their lawsuits with the various counties, thereby precluding state appellate review of those judgments. In House Bill 93, the State Legislature essentially codified the state court reinbursement holdings and adopted the *Alberti* district court's transfer remedy. Pursuant to this statute, Petitioners are required to reimburse counties for the costs of housing the state's prison-ready felons left in the counties' jails and must pay for transfers of prison-ready felons to other county jail facilities given overcrowded conditions.[22]

On July 25, 1991, the Fifth Circuit rendered its opinion in four consolidated appeals.[23] In this opinion, the Fifth Circuit held, *inter alia*, that Petitioners could not disclaim responsibility for violations of prisoners' Eighth Amendment rights in the Harris County Jail facilities under all arguments advanced by Petitioners.[24]

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22. Tex. Gov. Code §§ 499.123 & 499.125 (Vernon Supp. 1992).

23. *Alberti v. Sheriff of Harris County*, 937 F.2d 984 (5th Cir. 1991) (Petitioners' Appendix at A). The consolidated appeals related to County Respondents' and Petitioners' appeals of the district court's September 25, 1989 Findings of Fact and Conclusions of Law (Petitioners' Appendix at X); Respondents' appeal of the district court's October 23, 1989 order denying their motion to amend or supplement the September 25, 1989 Findings and Conclusions or for a New Trial (Petitioners' Appendix at W); County Respondents' and Petitioners' appeals of the district court's April 5, 1990, September 7, 1990, February 7, 1991 and March 15, 1991 injunctive remedial orders (Petitioners' Appendix at P, R, U & V); County Respondents' appeals of the *Ruiz* Court's February 7, 1991 and March 15, 1991 advisory opinions (Petitioners' Appendix at Q & S), Petitioners' appeal of the district court's April 22, 1991 and November 19, 1990 remedial orders (Petitioners' Appendix at O & T) and Petitioners' Petition for Writ of Mandamus, Motion to Stay the district court's May 28, 1991 Order and Motion to Stay and/or Petition for Writ of Prohibition, filed in the Fifth Circuit on or about March 5, 1991, June 5, 1991 and July 25, 1991. The orders found at Petitioners' Appendix at D-N were not part of the consolidated appeal decided on July 25, 1991.

24. *See generally, Alberti v. Harris County*, Petitioners' Appendix A.

On October 22, 1991, the Fifth Circuit denied Petitioners' Petition for Panel Rehearing, finding that neither House Bill 93 nor the settlement of *Harris County v. State of Texas* changed the legal relationship between the state and counties in such a manner as to require it to reconsider its earlier opinion or the district court's reimbursements made to Harris County.[25]

SUMMARY OF THE ARGUMENT

This case should not be reviewed on certiorari because the Fifth Circuit's opinion raises no issues of national importance, because there are no conflicting circuit court opinions commanding reconciliation by this Court, and because Petitioners have failed to present their petition for certiorari with accuracy in violation of Rule 14.5. Petitioners merely seek this Court to serve as a "super-appellate" court, reviewing well-settled legal principles and factual findings which have been decided adversely to them.

REASONS FOR DENYING THE WRIT

I.

THE FIFTH CIRCUIT'S *ALBERTI* OPINION DOES NOT CONFLICT WITH THIS COURT'S DECISIONS OR WITH THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS DECIDING THESE SAME OR SIMILAR MATTERS.

Petitioners' *Pennhurst* and Eleventh Amendment arguments are neither novel nor substantial, and have been squarely addressed previously by this Court. It is well-settled that federal district courts have broad discretion in imposing injunctive remedial relief with attendant ancillary costs against state officials when

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25. *See generally,* Petitioners' Appendix B.

vindicating constitutional rights.[26] Upon finding that Petitioners violated Respondents' Eighth Amendment rights, the district court was not only authorized, but was mandated, to fashion a remedial order to adjudicate the wrong.[27]

Petitioners argue that certiorari should be granted because *Alberti* conflicts with the Sixth Circuit's opinion in *Kelley v. Metropolitan County Board of Education*.[28] No such conflict exists. *Kelley* is patently inapplicable to the factual and legal issues raised in *Alberti*.

In *Kelley*, the Metropolitan County Board of Education sued state officials seeking recovery of costs previously incurred in a school desegregation case where the relief sought by the Plaintiffs — desegregation — had been fully implemented. In *Kelley*, unlike *Alberti*, the Sixth Circuit observed, "[t]he Tennessee officials are not doing anything wrong; they have been joined solely to permit one sometime constitutional wrongdoer to recover monetary compensation from another."[29] In *Alberti*, however, the

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26. *Milliken v. Bradley*, 433 U.S. 267, 97 S. Ct. 2749, 53 L. Ed. 2d 745 (1977); *Edelman v. Jordan*, 415 U.S. 651, 668, 94 S. Ct. 1347, 1358, 39 L. Ed. 2d 662 (1974); *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 2d 714 (1908).

27. In *Ruiz v. Estelle*, the same Petitioners in charge of the State's prison system argued that they were entitled to Eleventh Amendment immunity from suit. The Fifth Circuit rejected the State's Eleventh Amendment immunity claims, holding that the "Board members are responsible as individuals, in the same manner as the Director of TDC, for any violation of constitutional rights caused by their management." *Ruiz v. Estelle*, 679 F.2d 1115, 1137 (5th Cir.), *modified in part on other grounds*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042, 103 S. Ct. 1438, 75 L. Ed. 2d 795 (1983).

28. *Kelley v. Metropolitan County Board of Education*, 836 F.2d 986 (6th Cir. 1987), *cert. denied*, 487 U.S. 1206 (1988).

29. *Kelley*, 836 F.2d at 990.

Inmate Respondents and County Respondents have not sought the imposition of any monetary damages against the Petitioners, nor have such damages been assessed.[30]

In *Kelley*, unlike *Alberti*, the Sixth Circuit found that the record "simply did not show that the State of Tennessee is currently a participant in any constitutional violation."[31] In *Alberti*, in contrast, the district court held that Petitioners were directly causing continuing deprivations of Respondents' Eighth Amendment rights. Petitioners' *Kelley* argument also ignores the fact that the district court found that they caused the unconstitutionally overcrowded conditions in the Harris County Jail facilities, ignores the fact that the prison-ready felon population continued to grow, making it virtually impossible for the County Respondents to remedy the overcrowding in these facilities and hence provide constitutional conditions of confinement to all inmates, and ignores the fact that the district court gave Petitioners the choice of limiting the prison-ready population in the jail facilities or expending the ancillary costs associated with transferring those in excess of their cap to other county detention facilities.[32]

Upon review of these arguments, Judge Higginbotham observed:

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30. County Respondents' Appendix at I & J.

31. *Kelley*, 836 F.2d at 995. According to the Sixth Circuit, "[W]e have searched the record of this case in vain for any demonstration that the integration of metropolitan Nashville's schools has been wrongfully impeded by anything the state has done, or has failed to do, in the 1970s or 1980s. The mere fact that Tennessee was a constitutional wrongdoer prior to 1956 does not mean that it was still a constitutional wrongdoer when the district court entered its order 30 years later." *Kelley*, 836 F.2d at 993-94.

32. *See* Petitioners' Appendix S & X.

> The state also urges that the orders violate the Eleventh Amendment because they exact monetary rather than prospective relief. Like the *Pennhurst* argument, however, this contention mischaracterizes the orders — the plaintiffs established a federal constitutional violation, and the state is a responsible party. The required payments are thus 'a necessary consequence of compliance in the future with a substantive federal question determination.' . . . *Kelley*, cited extensively by the state, is distinguishable — the order remedying the violation in *Kelley* ran only against the county, and the state was not a current constitutional violator, yet the county sought reimbursement from the state for the costs of the remedial order.[33]

Indeed, the Fifth Circuit's *Alberti* opinion follows three cases "involv[ing] essentially identical situations" as presented in *Alberti*, including the Sixth Circuit's *Tate v. Frey* decision, the Second Circuit's *Benjamin v. Malcolm* decision (wherein certiorari was denied), and the Fifth Circuit's *Stewart v. Winter* decision.[34] There

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33. *Alberti v. Sheriff of Harris County*, Petitioners' Appendix at A34-A35, citing *Edelman v. Jordan*, 415 U.S. 651, 668, 94 S. Ct. 1347, 1358 39 L. Ed. 2d 662 (1974); *see also, Milliken v. Bradley*, 433 U.S. 267, 97 S. Ct. 2749, 53 L. Ed. 2d 745 (1977); *Williams v. Edwards*, 547 F.2d 1206, 1212-13 (5th Cir. 1977); *Jenkins v. Missouri*, 807 F.2d 657 (8th Cir. 1986), *rev'd in part on other grounds*, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974), and citing *Kelley*, 836 F.2d at 990-94.

34. *Alberti v. Sheriff of Harris County*, Petitioners' Appendix at A19-A22, A34-A35, citing *Stewart v. Winter*, 669 F.2d 328 (5th Cir. 1982); *Benjamin v. Malcolm*, 803 F.2d 46 (2d Cir. 1986), *cert. denied sub nom, Cuomo v. Koehler*, 480 U.S. 910, 107 S. Ct. 1358, 94 L. Ed. 2d 528 (1987); *Tate v. Frey*, 735 F.2d 986 (6th Cir. 1984) (per curiam).

is, therefore, no conflict between the Fifth and Sixth Circuits, or any other circuit.

II.

THE FIFTH CIRCUIT'S ABSTENTION AND CERTIFICATION HOLDINGS DO NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

In the Fifth Circuit, Petitioners argued that the district court should have abstained from ordering it to pay for the housing of prison-ready felons transferred to other Texas county jail facilities pending the ultimate resolution of the state litigation.[35] Both state cases have been resolved. In each case, the state district court found that Petitioners have a clear, mandatory, non-discretionary duty to take and make provision for prison-ready felons within a reasonable time after they are sentenced to the state penitentiary or to pay for their upkeep in Texas county jail facilities.[36] Thereafter, the parties settled the litigation. Given the resolution of these cases, Petitioners' argument is now moot.

Notwithstanding the mootness of Petitioners' argument, Petitioners' abstention and certification arguments wrongly

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35. *See Alberti v. Sheriff of Harris County,* Petitioners' Appendix at A35.

36. *See* County Respondents' Appendix at A-H. Petitioners argue that since they settled these cases before a state appellate court reviewed these decisions, the state court pronouncement should be given no weight in the federal proceedings. However, this Court has recognized that trial court interpretations constitute a ruling on a question of state law which is binding on the federal courts. *See City of Houston v. Hill,* 482 U.S. 451, 107 S. Ct. 2502, 2514, 96 L. Ed. 2d 398 (1987). Therefore, there was no necessity to abstain until a state appellate court had had an opportunity to rule. *Id.*

attempt to elevate matters of discretion to mandatory requirements. The Fifth Circuit's *Alberti* opinion presents no departure from settled principles which grant discretion to the lower courts in deciding whether to postpone or decline jurisdiction under the abstention doctrine.[37] This Court has admonished that abstention should only be used in extraordinary and narrow circumstances where it would clearly serve an important countervailing interest.[38] Abstention is the exception, not the rule.[39] After determining that none of the abstention theories fit the facts of *Alberti,* the Fifth Circuit found that the district court "simply adopted the approach of the only state court to have decided the issue pending a decision by a higher state court.[40]

"Federal abstention . . . presupposes the availability of an

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37. *Harman v. Forssenius,* 380 U.S. 528, 85 S. Ct. 1177, 1181, 14 L. Ed. 2d 50 (1965). "If the state statute in question, although never interpreted by a state tribunal, is not fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question, it is the duty of the federal court to exercise its properly invoked jurisdiction . . . . Thus, 'recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law.' " *Harman,* 85 S. Ct. at 1182 (citations omitted).

38. *County of Allegheny v. Frank Mashuda Co.,* 360 U.S. 185, 79 S. Ct. 1060, 1063 (1959).

39. *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 96 S. Ct. 1236, 1244, 47 L. Ed. 2d 483 (1976).

40. *Albert v. Sheriff of Harris County,* Petitioners' Appendix at A35-A36. While an appeal with a supersedeas stays the execution of the judgment, it does not, until and unless reversed, detract from its decisiveness and finality. *See e.g., Huron Holding Corp. v. Lincoln Mine Operating Co.,* 312 U.S. 183 (1941); *Fidelity St. Life Ins. Co. v. First Nat. Bank & Trust,* 510 F.2d 272, 273 (5th Cir. 1975), *cert. denied,* 423 U.S. 864 (1975).

alternative state forum which can afford full and fair relief."[41] Where certain types of relief are not available in state court, or where delay might significantly impair constitutional rights, abstention is inappropriate.[42] Petitioners erroneously characterize this case as simply a dispute between County Respondents and Petitioners.[43] On the contrary, the dispute resolved by the lower courts' orders is between the Inmate Respondents and Petitioners and is based upon federal constitutional law. In the present case abstention would have vitiated Inmate Respondents' federal constitutional claims against Petitioners. Furthermore, abstention would have prevented an adjudication of Petitioners' liability, leaving County Respondents strictly liable for Petitioners' breach of their federal constitutional duties. To impose a remedy against one defendant without ascertaining the respective liabilities of all defendants would have been contrary to established principles of jurisprudence and would have contravened fundamental concepts of due process, fairness and justice.

Petitioners urge that the district court's injunctive remedial orders "undermined" House Bill 2335's allocation formula by "de facto giving Harris County additional beds above its allocation formula."[44] Petitioners fail to mention, however, that the allocation formula specifically provided for the dedication of additional beds to counties with overcrowded jails. Petitioners also contend that the orders removed Harris County's financial

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41. *Nissan Motor Corp. v. Harding*, 739 F.2d 1005, 1010 (5th Cir. 1984), quoting *Duncan v. Poythress*, 657 F.2d 691, 696 n. 5 (5th Cir. 1981), *cert. dism'd*, 459 U.S. 1012, 103 S. Ct. 368, 74 L. Ed. 2d 504 (1982).

42. *Nissan Motor Corp.*, 739 F.2d at 1010-11 (citations omitted).

43. *E.g.*, Petitioners' Petition at 19-20.

44. Petitioners' Petition at 21.

burden of supporting inmates sentenced to state prison in excess of Harris County's allocation.[45] In *Harris County v. State of Texas,* the state district court not only found that House Bill 2335 and its allocation formula in no way relieved or excused Petitioners' financial liability for prison-ready felons, but also held that Petitioners unconstitutionally used *ad valorem* tax money collected by Harris County.[46] Even assuming *arguendo,* if there were a complex state regulatory scheme for sentencing and housing convicted felons, *Burford* would not require abstention.[47] No doctrine requires abstention merely because resolution of a federal question may result in the overturning of a state policy.[48]

Petitioners also argue that the Fifth Circuit abused its discretion in not attempting to certify the state law questions to the Texas Supreme Court. Certification is not mandated but is discretionary and provides no basis for this Court's review.

III.

THE *WILSON V. SEITER* ISSUE

This Court should deny Petitioners' application for certiorari on the *Wilson v. Seiter* issue because their contentions are presently pending before the Fifth Circuit, because Petitioners essentially ask this Court to serve as a fact-finder and because Petitioners' Petition misstates the record and holdings relating to this issue.

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45. Petitioners' Petition at 21-22.

46. *See, e.g.,* County Respondent's Appendix G at page 53a.

47. *New Orleans Public Service v. Council of New Orleans,* 109 S. Ct. 2506, 2514 (1989), citing *Burford v. Sun Oil Co.,* 319 U.S. 315, 63 S. Ct. 1098 (1943).

48. *Zablocki v. Redhail,* 434 U.S. 374, 98 S. Ct. 673, 678 n. 5 (1978).

Petitioners' *Wilson v. Seiter* contentions are not ripe for this Court's determination of certworthiness because they are presently pending before the Fifth Circuit after remand.[49] The Fifth Circuit's July 25, 1991 opinion remanded *Alberti* to the district court for its entry of findings regarding the "deliberate indifference" issue in light of *Wilson v. Seiter*.[50] On August 7, 1991, the *Alberti* court found that the Petitioners were deliberately indifferent.[51] Petitioners' appeal from this finding is presently pending before the Fifth Circuit. This finding is not of "such imperative public importance to justify deviation from normal appellate practice and to require settlement in this Court."[52]

Furthermore, Petitioners are essentially asking this Court to decide factual issues, as evidenced by their extensive citation to the *Alberti* court transcripts on pages 25 and 26 of their petition for writ of certiorari. Petitioners are requesting that this Court decide issues of fact concerning the reasonableness of the use of state mechanisms, such as the Prison Management Act. This Court would have to decide these factual issues before it could reach the legal issues implicated in *Alberti*. This Court is a "court of law . . . rather than a court for correction of errors in fact finding, [and] cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."[53]

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49. *Wilson v. Seiter*, 111 S. Ct. 2321 (1991).

50. *Alberti v. Sheriff of Harris County*, Petitioners' Appendix A40.

51. *See* Petitioners' Appendix J.

52. *See* S. Ct. R. 11.

53. *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 69 S. Ct. 535, 538, 93 L. Ed. 2d 672 (1949).

Finally, Petitioners' *Wilson v. Seiter* argument should be summarily denied because their argument misrepresents the *Alberti* record and misstates the Fifth Circuit's holdings. Petitioners boldly claim that nothing in the *Alberti* record suggests that they knew about the conditions in the Harris County Jail facilities prior to September, 1989.[54] Without even attempting a foray into the *Alberti* testimony and exhibits, the *Alberti* pleadings themselves reveal that Petitioners knew about the conditions in the Harris County jail facilities in October, 1988, when the Harris County Sheriff sent letters to Petitioner James Lynaugh, pleading for removal from the jail of the State's convicted felons. The district court's November 8, 1988 order directing the Sheriff to transfer prison-ready felons to the State's prison, County Respondents' December 12, 1989 motion to join Petitioners as Third Party Defendants, County Respondents' January 13, 1989 third party complaint and every one of the scores of *Alberti* pleadings filed before September, 1989, as well as the August, 1989 trial, gave Petitioners ample notice of the conditions of confinement in the Harris County Jail facilities.

Petitioners did not accurately restate the Fifth Circuit's discussion of the various methods by which they could have satisfied their duties to the Inmate Respondents.[55] Contrary to the two-item list given by Petitioners, the Fifth Circuit enumerated several "common sense solutions" and directed Petitioners to other solutions specified in a district court order.[56]

Petitioners argue that this Court must affirm a cost defense under *Wilson v. Seiter* because the Texas Legislature "resolved

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54. Petitioners' Petition at 23-24.

55. Petitioners' Petition at 24.

56. *Alberti v. Sheriff of Harris County*, Petitioner' Appendix at A30-31.

to build a set number of beds and allocate that capacity."[57] Petitioners neglect to acknowledge that they made no efforts to seek additional funding from the state legislature when confronted with the overcrowding problem.[58] Accordingly, they failed to make any showing that a "recalcitrant legislature was the culprit."[59]

Petitioners assert that *Ruiz* court orders prohibited their use of temporary housing "such as tent cities," and claim that "efforts to modify those orders have proved unsuccessful."[60] Petitioners failed to note that they have disregarded open invitations from the Fifth Circuit to seek modification of their *Ruiz* cap, and that their previous efforts to modify that cap included only one attempt in 1986, a year after they signed their overcrowding stipulation agreement in *Ruiz*.[61] These and other misstatements and inaccuracies require summary denial of Petitioners' Petition.

IV.

CONSTITUTIONAL CAPACITY

Petitioners have no standing to complain about the constitutional capacity limitations placed on the Harris County Jail facilities. No pending *Alberti* order imposes injunctive relief against Petitioners in conjunction with the district court's determination of the constitutional capacity of the jail facilities.

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57. Petitioners' Petition at 25.

58. Oct. 20, 1990 Tr. Vol. 1 at 66, ll. 18-25.

59. *Alberti v. Harris County,* Petitioners' Appendix at A31.

60. Petitioners' Petition at 25.

61. *See* County Respondents' Appendix at K; *Ruiz v. Lynaugh,* 811 F.2d 856 (5th Cir. 1987).

Furthermore, after only a passing reference to this issue in their Fifth Circuit brief, Petitioners did not fully brief this issue. They cannot, therefore, raise this issue before this Court.

V.

PETITIONERS' FAILURE TO ACCURATELY PRESENT THE LOWER COURTS' FACTUAL FINDINGS AND LEGAL HOLDINGS

"The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the Petition."[62] County Respondents are constrained to catalog the most blatant misstatements made by Petitioners made in violation of this Court's rules.

Petitioners state that the Texas Legislature, on "three occasions, failed to pass bills to compensate Texas counties for holding convicted felons."[63] They failed to note, however, that these bills never made it to the floor of the Legislature.[64] Petitioners urge that "state law is explicit and abundantly clear that the state prison system has a duty to accept inmates 'only' pursuant to former TEX. REV. CIV. STAT. ANN. art. 6166a-4 . . ."[65] The statute does not state this proposition, and the state court has ruled that Article 6166a-4, the allocation formula, does not change

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62. *See*, S. Ct. R. 14.5.

63. Petitioners' Petition at 6.

64. *Alberti v. Harris County*, Petitioner' Appendix at A27.

65. Petitioners' Petition at 7 (emphasis in Petition), citing Tex. Gov't Code § 499.071 (Vernon Supp. 1992).

Petitioners' duties owed to convicted felons.[66]

Petitioners maintain that House Bill 2335's "primary purpose was to establish a system of financial incentives and disincentives directed at controlling front-end population pressures by providing state financing for sentencing alternatives *while at the same time forcing local governments to fund the cost of their own transfer-eligible inmates.*"[67] Neither House Bill 2335, nor its legislative history, supports the highlighted portion of this proposition.[68]

In support of their arguments, Petitioners cite a Special Master's report which has not been adopted by the district court, and which is not properly part of the record in this Court.[69] Citing this report, Petitioners state that they have built or funded a grand total of 62,849 beds since 1984. They fail to add that the report references only the gross number of beds brought on line by Petitioners, while ignoring their own *Ruiz* depopulation agreements. They fail to acknowledge that they provided a net increase of only three prison beds in the state's penitentiary between 1982 and 1987, and a net increase of only 11,771 prison beds between 1982 and 1991.

Contrary to Petitioners' contentions, neither the legislative history of House Bill 93 nor the settlements of the state cases indicated that the State was liable for prisoner transfers only after October 1, 1991.[70]

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66. County Respondents' Appendix at A-H.

67. Petitioners' Petition at 8 (emphasis added).

68. *See* County Respondents' Appendix at A-H.

69. Petitioners' Petition at 8. Petitioners also cite a transcript of remarks which is not properly before this Court. *Id.* at 14.

70. *Compare,* Petitioners' Petition at 10.

These and the other examples of misstatements made by Petitioners included in this brief compel summary denial of Petitioners' Petition.

CONCLUSION

While every case involving the deprivation of constitutional rights is important, Petitioners have failed to establish any special and important reasons for this Court to grant certiorari in this case. County Respondents therefore ask this Court to deny Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A — FINDINGS OF FACT AND CONCLUSIONS OF LAW DATED NOVEMBER 26, 1990 — *THE COUNTY OF NUECES v. TEXAS BOARD OF CORRECTIONS*

IN THE DISTRICT COURT
TRAVIS COUNTY, TEXAS
250th JUDICIAL DISTRICT

NO. 452,071

THE COUNTY OF NUECES, TEXAS,

Relator,

vs.

TEXAS BOARD OF CORRECTIONS; CHARLES T. TERRELL; JERRY H. HODGE; F. L. STEFHENS; DERALYN DAVIS; JAMES ELLER; DENNIS R. HENDRIX; JOE V. LAMANTIA, JR.; ROBERT MANN; ALLAN B. POLUNSKY; JAMES A. LYNAUGH,

Respondents.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-captioned cause came on for trial before the Court without a jury in several proceedings. Partial summary judgment was rendered in favor of Plaintiff/Relator and Intervenors (the Counties). Evidentiary hearings were held on October 2-5, 1989 on Defendants/Respondents' impossibility defense; on April 30-May 2, 1990 on what constitutes a reasonable amount of time after sentencing for the State to take its prisoners or to begin compensating the Counties and what constitutes reasonable compensation per prisoner day when the State does not take the prisoners; and on August 8, 1990 on whether the amount of time and compensation found to be reasonable prior to the adoption

of the allocation formula on March 2,1990 pursuant to House Bill 2335 was reasonable thereafter. All parties were present through their attorneys at all trial proceedings. After considering the pleadings, the evidence, the argument and briefs from counsel, the Court in response to a request from the State makes its findings of fact and conclusions of law as follows:

FINDINGS OF FACT

1. This cause was commenced by Nueces County seeking a writ of mandamus to compel the Texas Board of Corrections; the members of the Texas Board of Corrections; and James A. Lynaugh, Executive Director of the Texas Department of Corrections, to take and to make provision for prisoners sentenced to confinement in the State penitentiary ("State prisoners") who were being held in the county jail (or in the jail of another entity under contract).

2. Seeking the same relief as Nueces County, the Counties of Bexar, Collin, Dallas, El Paso, Galveston, Hidalgo, Hunt, Lubbock, Tarrant, Travis and Victoria intervened (these counties together with Nueces County are referred to as "Counties").

3. The Counties demanded that Respondents carry out their duty to take prisoners within a reasonable time after sentencing to confinement in the State penitentiary and the Counties' demands were refused.

4. The Counties continue to hold state prisoners in their jails or in the jails of other entities under contract.

5. During the pendency of these proceedings, the Texas Board of Corrections and the Texas Department of Corrections were

replaced by successors.

6. The Texas Board of Criminal Justice is the successor to the Texas Board of Corrections and the Texas Department of Criminal Justice is the successor agency to the Texas Department of Corrections.

7. The State prison system is now operated by the Institutional Division of the Texas Department of Criminal Justice.

8. All the members of the former Board of Corrections were appointed to its successor, the Texas Board of Criminal Justice, and James A. Lynaugh was appointed by the new Board as Executive Director of the successor agency, the Texas Department of Criminal Justice.

9. The members of the Texas Board of Criminal Justice, the Executive Director of the Texas Department of Criminal Justice, and the Director of the Institutional Division of the Texas Department of Criminal Justice along with the respective Board, Department, and Division are Respondents in this action. (Respondents are hereafter jointly referred to as "TDC.")

10. Lack of joinder of all Texas counties and State prisoners in county jails does not impair or impede the ability of such parties to protect their interests.

11. The Crowding Stipulation in *Ruiz v. Lynaugh,* Civil Action No. H-78-987 (S.D. Tex.) (hereinafter "*Ruiz*") represents a settlement agreement entered by the State which, among other things, limits the State penitentiary inmate population.

12. It is not impossible for TDC to carry out its mandatory duty

to take State prisoners within a reasonable time after the prisoners are sentenced to serve a term in the State penitentiary.

13. A number of means of carrying out the mandatory duty to make provision for convicted felons are available to TDC including: a) contracting with private vendors, local governmental entities such as counties, or the federal government; b) use of the Prison Management Act, furloughs, and good conduct time to control prison population administratively; c) seeking reasonable modification of the crowding stipulation in *Ruiz* in good faith; and/or d) use of appropriated funds or seeking additional funds to perform this nondiscretionary obligation.

14. TDC has not compensated the Counties for holding State prisoners that TDC should have taken.

15. A demand by the Counties for payment of compensation from TDC for holding State prisoners would have been futile.

16. TDC was given opportunity to set an amount it deemed to be reasonable compensation to the Counties for carrying out the mandatory duty on which TDC had defaulted.

17. TDC refused to set an amount of reasonable compensation and requested a jury trial on this issue which was granted but was later withdrawn by TDC in favor of a trial before the Court without a jury.

18. TDC was given opportunity to set an amount of time that it considered to be a reasonable amount of time after sentencing for TDC to take its prisoners or to begin compensating the Counties that are providing for the prisoners because of the TDC's default.

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19. TDC refused to set an amount of reasonable time and requested a jury trial on this issue which was granted but was later withdrawn by TDC in favor of a trial before the Court without a jury.

20. The reasonable value of the services provided by the Counties in holding State prisoners that TDC should have taken is $40.00 per prisoner per day.

21. An amount of compensation to the Counties of less than the reasonable value of services provided in holding State prisoners would be an incentive to TDC to continue to impose its mandatory duty by default on the Counties which are unwilling and unauthorized to accept that duty.

22. A reasonable amount of time after sentencing for TDC to either take the State prisoners or begin compensating the Counties who hold the prisoners because of the TDC's default is seven days.

23. TDC's failure and refusal to carry out their duty to take State prisoners caused a backlog of State prisoners in the Counties' jails or in facilities with which the Counties contracted and made it futile for the Counties to timely prepare transfer paperwork and present prisoners to TDC for admission to the State penitentiary.

24. From September 28, 1987 through March 1, 1990, TDC's Scheduled Admissions Policy allocated to the Counties a portion of the total capacity available in TDC's prison facilities.

25. Effective March 2, 1990, the allocation formula adopted by TDC pursuant to Tex. Rev. Civ. Stat. Ann. art. 6166a-4 (Vernon Supp. 1990) allocates to the Counties a portion of the total capacity available in TDC's prison facilities.

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26. The number of prisoner days for which TDC is required to compensate the Counties for the period from September 28, 1987 through February 28, 1990 is as follows:

Bexar	403,750
Collin	77,318
Dallas	848,740
El Paso	220,367
Galveston	86,038
Hidalgo	63,013
Hunt	20,717
Lubbock	92,198
Nueces	143,266
Tarrant	377,021
Travis	170,987
Victoria	4,621

27. The aggregate amount of compensation owed by TDC to the Counties for the period from September 28, 1987 through February 28, 1990 is as follows:

Bexar	$16,150,000

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Collin	3,092,720
Dallas	23,949,600
El Paso	8,814,680
Galveston	3,441,520
Hidalgo	2,520,520
Hunt	828,680
Lubbock	3,687,920
Nueces	5,730,640
Tarrant	15,080,840
Travis	6,839,480
Victoria	184,840

28. The number of prisoner days and amounts of compensation listed in these findings do not include any prisoners (a) returned to county jail on bench warrants awaiting further proceedings, (b) awaiting trial in state court on the remainder of multiple charges, (c) placed in county jail pursuant to blue warrants prior to parole revocation proceedings, (d) being held on federal detainers awaiting trial in federal court, and (e) pending appeal of sentences of ten years or less who have not exercised their right to be transferred to the State penitentiary immediately upon sentencing.

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29. The $40 per prisoner per day compensation figure and the 7 day period from sentencing for compensation to accrue are reasonable for periods occurring from and after March 2, 1990.

30. The backlog of State prisoners in county jails has had the following effect: a) detrimentally affected the provision of local law enforcement services; b) diluted any deterrent effect that felony convictions might otherwise have on persons on whom prison terms are imposed by state judges and juries because their sentences are not being carried out with reasonable dispatch and certainty; and c) further eroded public confidence in Texas' criminal justice system.

31. The Counties' records regarding the number of State prisoners backlogged and the amount of time such prisoners were held in county jails and summaries of such records were examined by TDC's expert auditors from Price Waterhouse, and the number of prisoner days contained in these findings is consistent with the calculations made by Price Waterhouse for TDC.

32. A conservative estimate of the cost to TDC if TDC had taken actual physical custody of the State prisoners involved in this action is at least between $37.00 and $47.00 per prisoner per day.

33. The Crowding Stipulation which is the consent agreement in *Ruiz* in which TDC agreed not to exceed capacity limits set out therein has been modified on several occasions pursuant to TDC's good faith requests for modification.

34. TDC's request for modification in *Ruiz v. Lynaugh*, 811 F.2d 856 (5th Cir. 1987), with regard to use of the Fort Wolters substandard facilities was not a reasonable request because of the serious deficiencies in those facilities.

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35. TDC has taken a proactive role in requesting additional funds to comply with the agreements and orders in *Ruiz v. Lynaugh*, Civil Action No. H-78-987 (S. D. Tex.).

36. Despite their awareness of the backlog in county jails of State prisoners, TDC has not requested funds to provide for these State prisoners.

37. The federal court orders on which TDC bases its *res judicata*, collateral estoppel, and issue preclusion defenses do not reach the issue of TDC's duty to take State prisoners or to compensate the Counties for holding State prisoners.

38. A proposed amendment to Title 108, Revised Civil Statutes,adding article 6166a-3 which provided that the Texas Department of Corrections was not required to accept an inmate if such acceptance would cause the Texas Department of Corrections to exceed ninety-five percent of its capacity was rejected by the 71st Legislature.

39. The only documents required under article 42.09 of the Code of Criminal Procedure prepared after judgment and sentencing are the standardized felony judgment form and the statement of facts form which is required only if the standardized felony judgment form has not been modified to include citation to the Penal Code or other provision under which the convicted felon was sentenced to serve a term in the State penitentiary.

40. The standardized felony judgment form, which is used by all of the State district courts for sentencing persons to the State penitentiary, can be completed in five minutes or less.

41. All other documents provided pursuant to article 42.09 of

the Code of Criminal Procedure including the offense report, indictment, arrest record, change of venue statement, and criminal history are prepared prior to judgment and sentencing.

42. Even if the paperwork required by article 42.09 of the Code of Criminal Procedure is submitted to TDC prior to prisoners' transfer to the Institutional Division of the Texas Department of Criminal Justice, the paperwork is not reviewed or officially accepted until the prisoners are actually physically accepted by TDC at the Diagnostic Unit of the Institutional Division of the Texas Department of Criminal Justice.

43. Some of the alternatives available to TDC to take and make provisions for State prisoners are politically unpopular.

44. A backlog of State prisoners in county jails, which at some times amounted to approximately one-fourth of all convicted felons, was created by TDC's refusal to carry out its mandatory duty.

CONCLUSIONS OF LAW

1. This mandamus action is not precluded or otherwise barred by sovereign immunity.

2. A mandamus action to compel TDC to carry out its mandatory duty is not a suit against the State.

3. Adequate relief can be granted in this case without the joinder of all Texas counties and all State prisoners in county jails.

4. TDC has a clear, mandatory, non-discretionary legal duty to take and make provision for State prisoners in the categories

involved in this case within a reasonable time after they are sentenced to confinement in the State penitentiary.

5. The Counties — having established that TDC has a mandatory duty to take and make provision for such prisoners within a reasonable time, that the Counties have demanded that TDC perform its mandatory duty, and that TDC has refused their demands — have established the necessary elements for the granting of a writ of mandamus.

6. The burden of proof to establish impossibility or any other defense is on TDC.

7. TDC has not established impossibility or any other defense to the issuance of a writ of mandamus.

8. Neither TDC's Scheduled Admissions Policy, the Crowding Stipulation, nor any order issued in *Ruiz* preempts, modifies or nullifies TDC's State law duty to make provisions for the sentenced felons involved in this case nor prohibits the granting of mandamus.

9. The Counties have no adequate remedy at law other than this mandamus action.

10. TDC has authority to plan for prison population pressures and to carry out its mandatory duty to take and to make provision for convicted felons through various means.

11. Means available to TDC to carry out its mandatory duty to take and to make provision for State prisoners include: a) transferring funds between fiscal years and appropriations for various programs administered, supervised and operated by the

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Texas Department of Criminal Justice and the Texas Board of Criminal Justice; b) contracting with private vendors, counties, or the federal government to care for prisoners sentenced to the State penitentiary; c) greater or continuous use of the Prison Management Act, furloughs, or good conduct time.

12. The political unpopularity of some of the alternatives available to TDC to carry out their mandatory duty does not make it impossible for TDC to utilize these or other alternatives to perform its duty.

13. Counties are authorized to act only pursuant to statutory or constitutional provisions directly imposing duties on counties or necessarily implied in order to carry out such constitutionally or statutorily imposed duties.

14. No statutory or constitutional provisions or other law transfers to the Counties TDC's mandatory duty to take and to make provisions for the categories of prisoners involved in this case.

15. TDC has a clear, mandatory, nondiscretionary duty to make provisions for the proper care, treatment, feeding, clothing, and management of the prisoners involved in this case.

16. Inherent in and integral to TDC's duty to accept and to make provisions for the care and management of the prisoners involved in this action is the financial responsibility for the carrying out of TDC's duty.

17. TDC's default in performing its duty to make provisions for the care and management of the prisoners involved in this case does not transfer to the Counties TDC's duty or the financial responsibility for carrying out that duty.

Appendix A

18. TDC has a mandatory duty to compensate the Counties for services provided by the Counties in holding State prisoners that TDC should have taken.

19. Payment of compensation by TDC to the Counties may be mandated by this Court because TDC has failed to take the prisoners or to be financially responsible for them when it has a clear, mandatory, nondiscretionary duty to do so.

20. A writ of mandamus may issue against TDC to raise revenue to carry out its mandatory duty even though exactly how the revenue is to be raised may be left up to TDC, and even though TDC may have to look at third parties as a source of revenue.

21. TDC must seek and obtain or raise the revenues necessary to carry out its mandatory duty and to compensate the Counties when the Counties are required to hold State prisoners because of TDC's default.

22. An effective judgment and peremptory writ of mandamus in this action require the inclusion of provisions ordering TDC to compensate the Counties when they are holding State prisoners because of TDC's default in carrying out its mandatory duty to make provisions for such prisoners.

23. This action is a mandamus action is not an action for damages sounding in contract or tort.

24. The compensation awarded in this case is incident to this mandamus action and is not an award of damages.

25. Res judicata, collateral estoppel, or issue preclusion do not bar this action or constitute a defense to the issuance of a judgment

and peremptory writ of mandamus against TDC in this mandamus action.

26. Where, as in the instant case, a demand for performance of a mandatory duty would be futile the usual requirement for a formal demand and refusal may be dispensed with in a mandamus action.

27. TDC's duty to take and make provisions for the categories of prisoners involved in this action continues after the adoption of an allocation formula pursuant to Tex. Rev. Civ. Stat. Ann. art. 6166a-4 (Vernon Supp. 1990).

28. The Counties' failure to prepare and present to TDC the paperwork required to accompany prisoners transferred to the State penitentiary does not relieve TDC of its mandatory duty to make provisions for such prisoners within a reasonable time after their sentencing to terms in the State penitentiary because preparation and presentation of such paperwork would have been futile.

29. The adoption of an allocation formula under Tex. Rev. Civ. Stat. Ann. art. 6166a-4 (Vernon Supp. 1990) does not shift or transfer TDC's mandatory duty to the Counties.

30. The measure of compensation to be paid to the Counties is the reasonable value of the services the Counties have provided in holding State prisoners that TDC should have taken.

31. The measure of what constitutes a reasonable time for TDC to either take the prisoners or compensate the Counties holding the prisoners because of TDC's default is the amount of time it would reasonably take to perform the task of preparing the transfer paperwork and arranging for the transportation of the

prisoners if TDC were accepting the prisoners.

32. The paperwork requirements authorized by article 42.09 of the Code of Criminal Procedure do not alter or nullify TDC's duty to carry out judgments sentencing prisoners to the State penitentiary but rather create procedural and administrative requirements that are to be met at the time that prisoners are actually physically transported and transferred to the State penitentiary.

33. TDC is not required to compensate the Counties for days that State prisoners are held by the Counties pending parole revocation hearings, trial on other offenses, appeals of sentences of ten years or less when the prisoners have not elected to be transferred to the State penitentiary immediately upon sentencing, or dispositions of matters for which such prisoners are being held at the request of federal law enforcement authorities.

34. TDC's duty to take State prisoners or to compensate the Counties for holding such prisoners continues after March 2, 1990, as well as before that date.

35. TDC is liable for post-judgment interest at the rate of 10% in accordance with Tex. Rev. Civ. Stat. Ann. art. 5069-1.05 (Vernon Supp. 1980).

36. TDC is liable for costs of suit.

Signed this 26th day of November, 1990.

s/ Joseph H. Hart
JOSEPH H. HART
Judge Presiding
Travis County, Texas

APPENDIX B — JUDGMENT DATED AUGUST 22, 1990 — *THE COUNTY OF NUECES v. TEXAS BOARD OF CORRECTIONS*

No. 452,071

IN THE DISTRICT COURT, TRAVIS COUNTY, TEXAS
250TH JUDICIAL DISTRICT

THE COUNTY OF NUECES, TEXAS,

Relator,

vs.

TEXAS BOARD OF CORRECTIONS; CHARLES T. TERRELL; JERRY H. HODGE; F. L. STEPHENS: DERALYN DAVIS; JAMES ELLER; DENNIS R. HENDRIX; JOE V. LAMANTIA, JR.; ROBERT MANN; ALLAN B. POLUNSKY; JAMES A. LYNAUGH,

Respondents.

JUDGMENT

The above entitled cause came on for hearing before this Court on October 2 through 5, 1989, and April 30 through May 2, 1990. Relator Nueces County, Texas, and Intervenors, Bexar, Collin, Dallas, El Paso, Galveston, Hidalgo, Hunt, Lubbock, Tarrant, Travis and Victoria Counties, Texas, (the Counties) appeared through their attorneys, and Respondents, Texas Board of Criminal Justice (successor to the Texas Board of Corrections), Charles T. Terrell, Jerry H. Hodge, F. L. Stephens, Ben Gallant, Jr., James Eller, Pedro Diaz, Jr., Mamie Proctor, Robert Mann, Allan B. Polunsky, members of the Texas Board of Criminal

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Justice, James A. Lynaugh, Executive Director of the Texas Department of Criminal Justice, and James A. Collins, Director of the Institutional Division of the Texas Department of Criminal Justice, appeared through their attorney.

On April 18, 1989, and September 9, 1989, this Court granted partial summary judgment finding that Respondents had a mandatory, non-discretionary duty to take custody of prisoners sentenced by a trial court to the custody of Texas Department of Corrections ("TDC") or to its successor agency, the Texas Department of Criminal Justice ("TDCJ").

After presentation of testimony, evidence and argument of counsel at the October 2 through 5, 1989 hearing, the Court found that Respondents had not established legal impossibility or any other defense that would prevent issuance of a writ of mandamus. The Court also found that Respondents must reasonably compensate Relator and Intervenor Counties (the "Counties") for holding such prisoners if Respondents failed to take custody of such prisoners within a reasonable time.

After presentation of testimony, evidence and argument of counsel at the April 30 through May 2, 1990 hearing regarding what constitutes reasonable compensation and a reasonable time to take prisoners, the Court found that Respondents shall compensate Relator and Intervenor Counties for holding prisoners at the rate of Forty Dollars ($40.00) per day for each prisoner sentenced to the custody of the TDC or its successor agency, TDCJ; and further found that the compensation owed by the Respondents should begin to accrue seven (7) days after the date of the judgment and sentence of the court ordering confinement in the TDC or TDCJ. The evidence regarding the number of days that such prisoners were held in the Counties' jails after sentencing

for the period beginning September 28, 1987 up to and including February 28, 1990 was uncontrovered by the parties.

The Court has further found that Respondents' adoption effective March 2, 1990, of an allocation formula under the provisions of Tex. Rev. Civ. Sta. Ann. art. 6166a-4 (Vernon Supp. 1990) does not alter or shift to the Counties the Respondents' duty to take prisoners sentenced to the custody of the TDC or TDCJ, or to compensate the Counties for holding such prisoners.

After presentation of further testimony, evidence and argument of counsel at a hearing on August 8, 1990 concerning the applicability of the Forty Dollar ($40.00) amount and seven (7) day period after March 2, 1990, the effective date of the allocation formula, the Court found that after the adoption of the allocation formula Respondents shall compensate Relator and Intervenor Counties at the rate of Forty Dollars ($40.00) per day for each prisoner sentenced to the custody of the TDC or its successor agency, TDCJ; and further found that the compensation owed by the Respondents for post allocation formula periods should begin to accrue seven (7) days after the date of the judgment and sentence of the court ordering confinement in the TDC or TDCJ.

ACCORDINGLY, the Court is of the opinion that judgment should be rendered in favor of the Counties and that a Writ of Mandamus should be issued to compel Respondents to perform said duty.

IT IS, THEREFORE, ORDERED:

1. That a preemptory Writ of Mandamus issue directing and commanding Respondents, Texas Board of

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Criminal Justice, Charles T. Terrell, Jerry H. Hodge, F. L. Stephens, Ben Gallant, James Eller, Mamie Proctor, Robert Mann, Allan B. Polunsky, James A. Lynaugh, and James A. Collins to cause the Texas Department of Criminal Justice to provide for the care and custody of all prisoners sentenced by a court of competent jurisdiction to the TDCJ or to its predecessor, the TDC, or to compensate the Counties at a rate of Forty Dollars ($40.00) per day for each such prisoner held in the Counties' jails (including prisoners held in facilities with which the Counties have contracted) and to raise any revenue necessary to pay such compensation.

2. That Respondents' duty to provide for the care and custody of prisoners sentenced to the TDCJ or to its predecessor, TDC, or to pay compensation to the Counties for holding such prisoners, shall begin seven (7) calendar days after issuance of judgment sentencing and committing such prisoners to the TDCJ, or to its predecessor, the TDC.

3. That Respondents shall pay to the Counties the following amounts as the aggregate amount of compensation due to each County for all periods beginning September 28, 1987 up to and including February 28, 1990, for holding prisoners that were Respondents' responsibility under this Judgment:

Nueces	$ 5,730,640
Bexar	$16,150,000

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Collin	$ 3,092,720
Dallas	$33,949,600
El Paso	$ 8,814,680
Galveston	$ 3,441,520
Hidalgo	$ 2,520,520
Hunt	$ 828,680
Lubbock	$ 3,687,920
Tarrant	$15,080,840
Travis	$ 6,839,480
Victoria	$ 184,840

4. That Respondents shall pay to the Counties compensation in accordance with this Judgment for prisoners held by the Counties on or after March 1, 1990, that are the responsibility of Respondents. In computing the prisoner days for which compensation is owed from Respondents to the Counties, the Counties shall exclude days during which prisoners have elected, to the extent permitted by law, to remain in county jail; and days that prisoners are confined in county jail awaiting resolution of other judicial proceedings (e.g., persons on bench warrants or who are subject to detainer) prior to transfer to the TDCJ or its predecessor, the TDC.

5. That the Counties shall submit invoices to Respondents for payment of compensation for prisoners held by the Counties on or after March 1, 1990 (including prisoners held in facilities with which the Counties have contracted), for which Respondents are responsible under this Judgment, together with copies of the judgments of

commitment to the TDCJ or to its predecessor, the TDC, that correspond to the prisoners covered by the invoices.

6. That the Counties' invoices for compensation for the period from and after March 1, 1990 to the date of entry of this Judgment, shall be presented to Respondents by each County by submitting the invoice to the Director of the Texas Department of Criminal Justice by the last day of the month following the month in which this Judgment is entered. Thereafter, the Counties' invoices for compensation shall be presented by each County to Respondents by submitting the invoice to the Director of the Texas Department of Criminal Justice by the last day of the month following the month in which compensation to the County accrues under this Judgment.

7. That the Judgment hereby rendered shall bear interest in accordance with Tex. Rev. Civ. Stat. Ann. art. 5069-1.05 (Vernon Supp. 1990) at the rate of ten percent (10%) from the date of judgment until paid.

8. That costs of suit be taxed against Respondents.

IT IS FURTHER ORDERED that Respondents shall not by this Judgment be relieved of carrying out their obligations under any other relevant order issued by a court of competent jurisdiction, including the agreed orders Respondents have entered into in *Ruiz v. Lynaugh*, No. 78-087-CA; provided, however, that

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Respondents shall not be precluded from seeking modifications to such orders.

This Judgment should not be considered to contain findings of facts or conclusions of law.

SIGNED this 22nd Day of August, 1990

s/ Joseph H. Hart
JOSEPH H. HART, Judge
126th Judicial District Court
Travis County, Texas

APPROVED AS TO FORM:
HONORABLE JIM MATTOX
ATTORNEY GENERAL OF TEXAS

By:
MICHAEL P. HODGE
Assistant Attorney General
Chief, Enforcement Division
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APPENDIX C — PEREMPTORY WRIT OF MANDAMUS DATED AUGUST 22, 1990 — *THE COUNTY OF NUECES v. TEXAS BOARD OF CORRECTIONS*

NO. 452,071

IN THE DISTRICT COURT, TRAVIS COUNTY, TEXAS
250TH JUDICIAL DISTRICT

THE COUNTY OF NUECES, TEXAS,

Relator,

vs.

TEXAS BOARD OF CORRECTIONS; CHARLES T. TERRELL; JERRY H. HODGE; F. L. STEPHENS; DERALYN DAVIS; JAMES ELLER; DENNIS R. HENDRIX; JOE V. LAMANTIA, JR.; ROBERT MANN; ALLAN B. POLUNSKY; JAMES A. LYNAUGH,

Respondents.

PEREMPTORY WRIT OF MANDAMUS

On April 18, 1989 and September 9, 1989 this Court granted partial summary judgment in the above numbered and styled cause finding the Respondents, Texas Board of Criminal Justice, Charles T. Terrell, Jerry H. Hodge, F. L. Stephens, Ben Gallant, Jr., James Eller, Pedro Diaz, Jr., Mamie Proctor, Robert Mann, Allan B. Polunsky, James A. Lynaugh, and James A. Collins have a mandatory, nondiscretionary duty to take custody of inmates sentenced by a trial court to the custody of Texas Department of Corrections or its successor agency Texas Department of Criminal Justice.

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On October 2-5, 1989 and April 30-May 2 and August 8, 1990, in hearings in the above-numbered and styled cause this Court further found that Respondents had not established legal impossibility or any of the defenses that would preclude issuance of a writ of mandamus and that Respondents have a duty to reimburse the Relator Nueces County, Texas and Intervenors Bexar, Collin, Dallas, El Paso, Galveston, Hidalgo, Hunt, Lubbock, Tarrant, Travis, and Victoria Counties, Texas ("Counties") by paying them reasonable compensation in the amount of $40 per day for the care, treatment, feeding, clothing and management of the inmates that the State should have taken. The compensation should begin to accrue seven days after the date of the judgment and sentence of the court ordering confinement in the Texas Department of Corrections, or the successor agency, the Texas Department of Criminal Justice. Respondents have a duty to take all actions necessary to obtain funds required to pay such amounts of compensation.

The Counties have demanded that Respondents perform their duty to take inmates and Respondents have unjustly refused and still refuse to take or make provisions for the inmates.

Respondents show by their acts of refusal to perform the ministerial duty to take the inmates that it is futile for the Counties to issue formal demands for compensation and this Court dispenses with the need for a formal demand and refusal.

The Respondents' failure to fulfill their duty as outlined above has resulted in manifest injury to the Counties.

Therefore, this Court commands Respondents to provide for the care and custody of all prisioners sentenced by a court of competent jurisdiction to the Texas Department of Criminal Justice

or its predecessor the Texas Department of Corrections, or to compensate the Counties at the rate of $40 per day for each such prisoner held in the Counties' jails (including prisoners held in facilities with which the Counties have contracted) after seven days from the date of judgment and sentence.

This Court further commands Respondents to pay to the Counties the aggregate amount of compensation at the rate of $40.00 per day which has accured for all periods up to and including February 28, 1990, for holding prisoners (including prisoners held in facilities with which the Counties have contracted) that Respondents failed to provide for under Respondents' duty to provide for the care and custody of all persons sentenced by a court of competent jurisdiction to the Texas Department of Criminal Justice or its predecessor the Texas Department of Corrections and to continue paying amounts that become due until such time as Respondents carry out their duty as outlined above. The aggregate amounts due each County are:

Nueces	$ 5,730,640
Bexar	$16,150,000
Collin	$ 3,092,720
Dallas	$33,949,600
El Paso	$ 8,814,680
Galveston	$ 3,441,520
Hidalgo	$ 2,520,520

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Hunt	$ 828,680
Lubbock	$ 3,687,920
Tarrant	$15,080,840
Travis	$ 6,839,480
Victoria	$ 184,840

Further, this Court commands Respondents to take all action necessary to obtain funds to pay reasonable compensation.

You are hereby further commanded to make return to this writ before this Court on November 26, 1990 at the Travis County Courthouse, stating how you have executed or what you have done in compliance to this writ and have you then and there this writ.

Signed this 22nd day of August, 1990

s/ Joseph H. Hart
Joseph H. Hart, Judge
126th Judicial District Court
Travis County, Texas

APPENDIX D — LETTER DECISION DATED MAY 31, 1990 — *THE COUNTY OF NUECES v. TEXAS BOARD OF CORRECTIONS*

SEAL OF THE STATE OF TEXAS

JOSEPH H. HART
District Judge
126th Judicial District Court

P.O. BOX 1748
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May 31, 1990

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Appendix D

Re: Cause No. 452,071; The County of Nueces, Texas
vs. Texas Board of Corrections, et al.

Dear Counsel:

In the letter decision of November 21, 1989 I held that the counties had proven all elements necessary for the issuance of a writ of mandamus to take prisoners committed to TDC and that the State failed to prove the defense of impossibility. I held that a mandamus would also issue requiring TDC to reimburse the counties the reasonable amounts for the care, treatment, feeding, clothing and management of the inmates that the State should have taken and to raise the revenues required to pay such amounts. In that letter I did not reach the question of the effect of the allocation formula (37 T.A.C. 152.3) on TDC's duty to take the prisoners or reimburse the counties. At that time the statutorily required allocation formula had not yet taken effect, and TDC was refusing to take prisoners on the basis of its own admissions policy. On March 2, 1990, the formula became effective, and the question is now ripe for decision.

The question remaining in the November 21, 1989 letter was whether prisoners which were not taken by the state because of the formula could be considered as "committed to the county jails by lawful authority" [Local Gov't Code Ann. § 351.041(a) (Vernon 1988)]. If so, then arguably the counties would be liable for the expenses of care of the prisoners. Tex. Crim. Proc. Code Ann. art. 104.002(a) (Vernon Supp. 1989); *See* Tex. Att'y Gen. Op. Nos. JM-615, JM-730 and JM-743. I hold that article 6166a-4 [Tex. Rev. Civ. Stat. Ann. art. 6166a-4 (Vernon Supp. 1990)] and the allocation formula cannot be read to require the counties to pay for the prisoners which have been committed to TDC by

lawful court order but which the state has refused to take by default.

I have outlined below generally the reasons for my decision. Again, this letter should not be considered findings of fact or conclusions of law nor is it intended to preclude other findings or conclusions not expressed in the letter.

The statutes by which prisoners are sentenced to TDC are clear and unambiguous. They clearly provide that individuals convicted of felonies "shall be punished by confinement" in TDC and that TDC shall transport the prisoners to the state penitentiary. Tex. Penal Code Ann. §§ 12.31-12.34 (Vernon 1988); Tex. Crim. Proc. Code Ann. art. 42.09 (Vernon 1988); Tex. Rev. Civ. Stat. Ann. art. 6166r (Vernon Supp. 1989).

On the other hand, article 6166a-4, on which the state relies, is ambiguous at best. Insofar as the responsibility for housing felons is concerned, it calls for the development of a formula which "allocates. . .to each county. . . the number of institutional division admissions allocated to the county. . . .until sufficient capacity is available." It neither expressly relieves the state of the duty to take and confine felons nor expressly places that duty on the counties. Only by inference can such an interpretation be reached. If article 6166a-4 is interpreted as TDC requests, however, this ambiguous statute will have the following effects:

1. H.B. 2335 which places the "primary responsibility" for the confinement, supervision and rehabilitation of felons on the Texas Department of Criminal Justice will be rendered meaningless. Act of June 15, 1989, Ch. 785, art. 1, § 1.02, 1989 Tex. Sess. Law Serv. 3471 (Vernon) (H.B. 2335).

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2. The statutes cited above which unambiguously require that TDC confine felons will, in effect, be repealed.

3. The portions of the court orders which sentence felons to TDC will be meaningless.

4. New duties will be placed on the counties which they have never had before, possibly in violation of article 5, § 18(b) of the Texas Constitution. Conversely, the State will be relieved of duties clearly placed on it by statute.

5. The taxpayers of the affected counties will have to shoulder a tremendous financial burden which under the unambiguous statutes should be borne by the whole state. Governor Clements has stated:

> It is totally wrong to house state prisoners in county jails.
>
> Convicted felons should serve their sentences behind prison walls — *not in crowded county jails at local taxpayer expense.*
>
> Clements, *Message from the Governor*, 1 Texas Criminal Justice Intelligence, No. 3 (June/July 1988). (Emphasis added)

Even according to the state's figures based on incremental costs, the amount exceeds $36,000,000. The counties' figures are several times higher.

Had the legislature wished to have such a profound effect on the criminal justice system and the taxpayers of the affected

counties, it could have done so with clear, unambiguous language. For example, one part of H.B. 2335 explicitly allows "a period of detention in a county jail" for convicted felons. Tex. Crim. Proc. Code Ann. art. 42.12, § 12 (Vernon Supp. 1990).

Furthermore, as mentioned in the letter decision of November 21, 1989, an attempt was made to enact a statute to do exactly what the state requests that I do in this case, that is, relieve it from financial responsibility. A proposed amendment to article 6166a-3 would have stated specifically that TDC was "not required to accept an inmate for confinement if accepting will cause the department to exceed 95% of its capacity. . . ". The legislature failed to pass the proposed amendment; I will not by judicial construction perform an act which the legislature itself rejected.

The defendant is asking that I manufacture from the ambiguously worded article 6166a-4 precisely what the legislature failed to enact. The statutes clearly placing the responsibility on the state are in effect and should not be repealed by such a vague and ambiguous statute. *Meek v. Wheeler*, 125 S.W. 2d 331 (Tex. Civ. App. — Amarillo 1930) aff'd 144 S.W. 2d 885 (Tex. Comm'n App. 1940, opinion adopted). The repeal of clear, long standing statutes should not arise by implication. Sutherland, *Statutory Construction*, § 23.10 (4th Ed. 1984).

I hold, therefore, that article 6166a-4 does not relieve the state of its duty to take the prisoners or shift the responsibility to the counties. The addition of the allocation formula does nothing more than control the administrative process of allocating available space to the institutional division. The duty of the state to take felons sentenced to the custody of the state or reimburse the counties continues after March 2, 1990.

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Thank you.

Very truly yours,

s/ Joseph H. Hart
JOSEPH H. HART
Judge, 126th District Court
Travis County, Texas

JHH/jw

APPENDIX E — LETTER DECISION DATED NOVEMBER 21, 1989 — *THE COUNTY OF NUECES v. TEXAS BOARD OF CORRECTIONS*

SEAL OF THE STATE OF TEXAS

JOSEPH H. HART
District Judge
126th Judicial District Court

P.O. BOX 1748
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November 21, 1989

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Appendix E

Re: Cause No. 452,071; The County Nueces, Texas
vs. Texas Board of Corrections, et al.

Dear Counsel:

Based on the evidence, authorities and briefs submitted and arguments of counsel, I have reached a decision in this case. I have outlined below in general the bases for my decision. This letter should not be considered formal facts or conclusions of law, nor is it intended to preclude other findings or conclusions which may support the decision.

Question Presented

The ultimate question involved in this case is whether or not a mandamus should issue either to compel TDC to take convicted felons being housed by the counties or to pay for the costs of care and maintenance of such felons, or both.[1]

Elements

Before a mandamus may issue, there must be a mandatory, non-discretionary legal duty on the part of TDC to take the inmates, the Counties must have demanded that TDC perform such duty, and TDC must have refused to perform. *Stoner v. Massey*, 586 S.W. 2d 483, 486 (Tex. 1979). By a summary judgment I have already ruled that TDC has a mandatory, non-discretionary duty to take the inmates:

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1. "TDC" will be used to refer to the respondents Texas Board of Corrections, its members, the Department of Corrections and its director, although the names have now been changed to the Texas Board of Criminal Justice and Texas Department of Criminal Justice. Nueces County and the intervening counties will be referred to as "Counties".

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1. The Penal Code states that individuals convicted of felonies "shall be punished *by confinement in the Texas Department of Corrections*" for various periods. Tex. Penal Code Ann. §§ 12.31-12.34 (Vernon 1988) (Emphasis added).

2. Under the Code of Criminal Procedure a convicted felon *must* be transferred to TDC, under certain ascertainable conditions, when his sentence is pronounced. Tex. Crim. Proc. Code Ann. art. 42.09 (Vernon 1988); *Ex Parte Rodriguez*, 597 S.W. 2d 771 (Tex. Crim. App. 1980).

3. Article 6166r states that the "director [of TDC] *shall* make suitable provisions. . .for the safe transportation of prisoners from counties where sentenced *to the State penitentiary*. . . ." Tex. Rev. Civ Stat. Ann. art 6166r (Vernon Supp. 1989). (Emphasis added).

4. Under H.B. 2335 the "department is the state agency with *primary responsibility for*: (1) the *confinement*, supervision and rehabilitation of felons." Act of June 15, 1989, ch. 785, art. 1, § 1.02, 1989 Tex. Sess. Law Serv. 3471 (Vernon) (H.B. 2335). (Emphasis added).

I have also ruled that the Counties have demanded that TDC perform its duty to take the inmates and that TDC has refused to do so. Therefore, under *Stoner* the Counties have satisfied the elements for the granting of a mandamus.

Mootness

TDC has suggested that due to the passage of H.B. 2335 this case has been rendered moot. I have previously overruled this suggestion. The primary changes resulting from H.B. 2335 were the removal of the word "speedy" as a modifier of

"transportation" from art. 6166r and the requirement that a formula should be developed in the future for allocating admissions from the counties to the TDC until a sufficient capacity is available.

The removal of the word "speedy" results only in the implication of a "reasonable" time in which to perform the transportation. Sutherland, *Statutory Construction,* § 55.03 (4th Ed. 1984). The allocation formula, under H.B. 2335 is yet to be devised or implemented; its impact on TDC's responsibilities after it does take effect is not ripe for decision. The question of TDC's past and current duties prior to the implementation of the allocation formula is before me and is not moot.[2]

Impossibility

The remaining question, and that addressed in the hearing beginning October 2, 1989, was whether the taking of prisoners by TDC that were ready for transfer from the counties is

---

2. No other provision shifts to the counties, or relieves the state from the obligation to confine TDC ready prisoners. Had the legislature wanted to relieve TDC of its duty to accept the inmates, it could have done so. A proposed amendment to art. 6166a-3 "relating to duty of the state to house felons" stated that the "Texas Department of Corrections is not required to accept an inmate for confinement in the department if accepting will cause the department to exceed 95% of its capacity . . . ." That amendment was deleted. If the intent of the legislature was to relieve the state of its duty to take, such intent was not expressed in any enacted legislation and must be inferred. There is a presumption against the repeal of prior laws by implication, and this rule is especially applicable to laws, such as those in question, which are important public statutes of long standing. If legislators are to make such fundamental changes in the obligation of the department as suggested by TDC, they should designate the provision to be changed, ratheer than leaving the repeal to arise by implication. Sutherland, at § 23.10.

impossible. This was an affirmative defense expressly raised by TDC, and if proven, a mandamus could not issue. *Manion v. Lockhart*, 131 Tex. 175, 114 S.W. 2d 216, 219 (1938).

1. Burden of Proof

In my letter decision of March 21, 1989, I implied that the burden of proving impossibility would be on TDC. TDC proceeded at the trial on the question as though it did have the burden. TDC has now cited *King v. Guerra*, 1 S.W. 2d 373 (Tex. Civ. App. — San Antonio 1927, writ ref'd), for the proposition that the party seeking a mandamus has the burden to negative every fact that would have authorized defendant to refuse to take action. I do not believe that *King*, if it is still the law, applies to this case. *King* involved the denial by the Board of Commissioners of San Antonio of an application for the issuance of a permit authorizing the relator to construct and operate an undertaking establishment. In reaching its decision, the board had to weigh various factors involving the public health and welfare. The only question involved was "the validity of the *discretionary* act." *Id.* at 377 (Emphasis added). The essence of the ruling on burden of proof was that the board did not have the burden of proving the existence of the various factors it considered in denying the application. The matters in question were not actually affirmative defenses. Here, on the other hand, there is no discretion involved in determining the duty to take the prisioners. Prisoners have been convicted of crimes which require TDC to take charge of them. The affirmative defense has been raised that it is impossible to take them.

The law on this point is, I believe, more accurately set out in the following authorities:

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55 C.J.S. "Mandamus" § 325 (1948):

"The burden of proof is on respondent to prove matters set up in defense. . . ."

53 Am. Jur. 2d "Mandamus" § 466 (1970):

"Where, however, the right and the duty appear, the burden of proving matter set up by way of excuse for failure to act, or of justifying such failure to act, rests upon the respondent or defendant. And if the petitioner makes out a prima facie case for the issuance of the writ, the burden of refuting it is on the respondent."

One author on the subject has summarized the law as follows:

"The conduct of the trial in mandamus differs in no respect from the trial of any civil action, the burden of proof being governed by the general rule that the party holding the affirmative of the issue must establish his allegations by a preponderance of the evidence. The burden of establishing a clear legal right to the relief sought is therefore primarily on relator. [M]atter in avoidance alleged in the return, if denied by relator, must be proved by respondent.

"Following the general rule, affirmative averments in the answer, as fraud, are upon respondent to prove." Ferris, *The Law of Extraordinary Legal Remedies*, 304-306 (1926).

Texas cases more in point than *King* have followed the position in the authorities set out above. In *City of Beaumont v. Stephenson*, 107 S.W. 2d 915, 917 (Tex. Civ. App. — Beaumont 1937, writ dism'd) a mandamus was sought against the city to

require it to pay a draft. The city alleged that relator did not show that the city had available funds sufficient to pay the draft. The Court held that "this point was one of defense to be pleaded and supported by proof by [respondents]."

In *Simpson v. Williams Rural High School District*, 153 S.W. 2d 852, 855 (Tex. Civ. App. — Amarillo 1941, writ ref'd) a mandamus was sought to order the school board to sign and affix the corporate seal of the school district to bonds to allow payment on interest coupons. The obligation represented by the interest coupons was valid. Respondent sought to defeat the mandamus based on fraud and false representations. The Court placed the burden of proof of affirmative defenses on respondent:

> In order for the appellees to defeat appellant's suit because of false representations, it was necessary for them to show that the appellant or his agent made representations which were false, were as to material facts, were made with the intent and design to induce appellees to refund the interest coupons and that such representations were relied upon by them. The testimony wholely fails to establish the elements constituting fraud based on false representations.

Like the fraud in *Simpson*, impossibility is also an affirmative defense for which I hold respondent has the burden of proof.

2. Proof of impossibility

The question remaining is whether or not respondent has met its burden and proven impossibility. I hold that it has not.

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I have already held that the *Crowding Stipulation* in *Ruiz v. Lynaugh*, Civil Action No. H-78-987 (S.D. Tex.), which requires a 95% population cap in TDC does not in itself make compliance with a writ of mandamus an impossibility. Other than a modification of the *Crowding Stipulation*, there are various measures that could be taken by TDC to take the prisioners from the counties. I do not believe that a preponderance of the evidence indicates that these other measures cannot be used. While each alone may not allow TDC to take all the prisioners from the counties, that does not mean that in combination all or part of the prisoners could not be removed from the county jails. Such other methods include contracting with private vendors, the federal government, and local governments and greater use of the Prison Management Act, [Tex. Rev. Civ. Stat. Ann. art 6184o (Vernon Supp. 1984)], furloughs, and good time.

Some of the measures would be costly; some are perceived to be politically unpopular. These factors, however, do not make the carrying out of TDC's mandatory duty impossible. Funds appear to be available within the existing appropriation bill, pursuant to several riders, including riders 8, 45, 56 and 57. Further, statutory authority exists for contracting with counties and private vendors and with the federal government. Texas Gov't. Code Ann. §§ 494.001, 494.021 and § 494.022. (Vernon Supp. 1989).

TDC has argued that the counties could make greater use of diversionary programs called for in H.B. 2335. However, the possible use of the diversionary programs at the local level does not relieve TDC of any duty to take the prisioners nor does it create an impossibility.

I find, therefore, that TDC has not met its burden of showing impossibility.

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Mandamus to Take

All elements for the issuance of a mandamus having been proven by the counties, and TDC having failed to prove by a preponderance of the evidence that it would be impossible to take the prisoners, the mandamus will issue requiring TDC to take the state ready prisoners within a reasonable time. As I have held previously, while there may be some limited flexibility as to when prisoners are to be accepted, I hold that Texas statutes do not vest discretion in TDC to delay accepting state-ready inmates on the basis of relative overcrowding at state and local facilities. *Ayres v. Coughlin*, 72 N.Y. 2d 346, 530 N.E. 2d 373, 533 N.Y.S. 2d 849 (1988). That is, the fact of overcrowding will not be considered relevant to the question of what is a reasonable time to receive prisoners.

Mandamus to Reimburse or Pay

The Counties have also sought a mandamus for TDC to pay or reimburse them for the costs of housing prisoners that are TDC ready. As held above, TDC does have an obligation to take the prisioners. Therefore, normally the prisoners would be transported to and confined in TDC. Tex. Penal Code Ann. §§ 12.31-12.34; Texas Crim. Proc. Code Ann. art. 42.09; art. 6166r.

Had TDC met its statutory obligations and confined the felons in TDC, then the financial burden would clearly be on TDC. Article 6166g provides that the Texas Board of Corrections and the director:

> shall be responsible for. . . the proper care, treatment, feeding, clothing and management of the prisoners confined therein.

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Tex. Rev. Civ. Stat. Ann. art. 6166g (Vernon 1970).

Questions have previously arisen as to whether or not prisoners who are in the legal, but not physical custody of TDC, similar to the situation in this case, could be considered "confined therein" within the meaning of article 6166g. Attorney General opinions have discussed the comparative responsibility between counties and TDC in such situations, for example, for medical costs where a TDC prisoner was in a county jail awaiting hearing on a violation of parole conditions [Tex. Att'y Gen. Op. No. JM-743(1987)] or in the county jail from TDC on a bench warrant [Tex. Att'y Gen. Op. No. JM-730 (1987)]. The Attorney General considered article 6166g along with article 104.002(a) [Tex. Crim. Proc. Code Ann. art. 104.002(a) (Vernon 1988)] which states that a county is liable for expenses incurred in the safe keeping of prisoners confined in the county jail. He concluded that "confined therein" meant the physical presence of the prisoner in TDC was necessary before TDC, rather than the counties, would be liable for the prisoners' expenses.[3]

However, Opinion Nos. JM-730 and JM-743 must be construed in light of art. 5116 (Vernon 1987) [now Tex. Local Gov't Code Ann. § 351.041(a) (Vernon 1988)], as was done in Att'y Gen. Op. No. JM-615 (1987). Article 5116 states that the sheriff shall safely keep in jail "all prisoners committed thereto *by lawful authority*, subject to the order of the proper court. . . "

---

3. Article 6166g has been changed and is now art. 492.001(a) of the Government Code. The phrase "prisoners confined therein" has been dropped and replaced by "inmates." A question could arise, therefore, as to whether it is still necessary that prisoners be physically confined in TDC for TDC to be responsible for their care. I will interpret the phrase "prisoners confined therein" to be synonymous with the word "inmates" for purposes of this decision.

(Emphasis added). In other words, as long as TDC prisoners are committed to a county jail *under lawful authority*, the county is responsible for their care, even though they may be in the legal custody of TDC. In the situations described in Opinion Nos. JM-615, JM-730 and JM-743, TDC prisoners were required to be in the county jails by law (thereby complying with art. 5116); therefore, the counties were liable for expenses for care of the prisoners under art. 104.002 of the Code of Criminal Procedure.

Here, however, the situation is completely different. The prisoners have been committed to the custody of TDC by the trial courts. They are in the county jails not under lawful authority, such as under a bench warrant or for a parole violation hearing, but by default. The admissions policy used by TDC violates its statutory duty to take prisoners and, therefore, can not be considered lawful authority. The question is, therefore, as follows: Can TDC merely by defaulting on its obligations and by refusing to take the prisoners (so that they are not physically "confined therein") shift the burden and cost of housing and caring for the TDC-ready prisoners to the taxpayers of the counties where those prisoners are being housed (although not "under lawful authority")?

I hold that it cannot and that responsibility for the proper care, treatment, feeding, clothing and management of the TDC-ready prisoners is on the state, not the Counties.[4]

---

4. Under art. 5115.1, § 11 (Vernon 1987) [Now Tex. Gov't. Code Ann. § 511.012 (Vernon 1989)] and Attorney General Opinion MW-398 (1981) the Commission on Jail Standards can require a county to accept prisoners from another county's jail that does not comply with minimum jail standards. The statute requires that the county of the non-complying jail bear the costs of transportation and maintenance of the prisoners. It is interesting that the state

(Cont'd)

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Where a county incurs costs as a result of performing the public obligation of another public entity, the other entity may be required to reimburse the performing county. *Orange County v. Cow Bayou Canal Co.*, 143 S.W. 963 (Tex. Civ. App. — Galveston 1912, no writ). The primary responsibility for confinement of felons is expressly placed on TDC. H.B. 2335, art. 1, § 1.02(a). Where a governmental body refuses to appropriate or pay when it has the clear, statutory duty to do so, payment may be mandated by the district court. *Vondy v. Commissioners of Uvalde County*, 620 S.W. 2d 104 (Tex. 1981) (mandamus against County Commissioners to set a reasonable salary for the constable).[5] Where an amount is owed that is not fixed, the county still may be mandamused to calculate a reasonable amount, even if it may require an additional decision by the respondent as to what is reasonable. *Id.* at 109.

Where the funds to pay may not be available, a mandamus may issue against a governmental authority to "raise revenue" even though exactly how the revenue is to be raised may be left up to the authority and even though the authority may have to look to third parties as a source for the revenue. *Hawthorne v.*

(Cont'd)
is willing to require non complying counties to reimburse other counties who cover for their deficiencies while the state is not itself willing to do the same when counties cover for the *state's own non-compliance* with federal standards.

5. Another basis for the holding in *Vondy* was the inherent power of the court to protect and preserve the proper administration of the judicial system. This ground is arguably present here, as judicially ordered sentences could not be carried out without means to incarcerate as required by law, i.e. without confinement in TDC. I do not base my decision on the inherent power of the judiciary, however.

La-Man Constructors, Inc., 672 S.W. 2d 255 (Tex. App. — Beaumont 1984, no writ). In addition, a mandamus may issue to pay an amount owed if and when funds are lawfully available or when the voters approve an appropriate tax levy. *Coulson v. Harris County MUD No. 29*, 678 S.W. 2d 726 (Tex. App. — Houston [14 Dist] 1984, writ ref'd n.r.e.). Courts may dispense with a formal demand for payment and refusal where the respondent shows, as it does here, that such a demand would be futile, *see, e.g., City of Austin v. Cahill*, 99 Tex. 172, 88 S.W. 542, 545 (1905) or where the respondent has neglected and refused to perform its ministerial duty, as TDC has done in refusing to take the prisoners. *Lake L.B.J. MUD v. Coulson*, 771 S.W. 2d 145, 156 (Tex. App. — Austin 1988), *aff'd in part and rev'd in part on other grounds*, 32 Tex. Sup. Ct. J. 442, 447 (June 10, 1989) (The Supreme Court affirmed the holding of the Court of Appeals that the Texas Water Code does not authorize the issuance of a mandamus to collect a judgment debt created by the same judgment.)

An interpretation of article 6166g [now Government Code § 492.001(a)] that the TDC could refuse to be financially responsible whenever it wished and for whatever reason so long as the inmates were not physically confined in TDC would render § 492.001(a) and TDC's duty to care for inmates meaningless. *Cf. Vondy*, 620 S.W. 2d at 109.

Therefore, I hold, that a mandamus will issue requiring TDC to pay the reasonable costs that the Counties have incurred in the care, treatment, feeding, clothing and management of the inmates, and to raise the revenue to pay such costs.

I do not decide at this point what amount should be paid (*Vondy*) or from what sources such funds should come

(*Hawthorne*). The determination of the amount of the reasonable costs will initially be left to TDC. I urge TDC and the Counties to confer together to resolve this issue. The source of the funds is a decision to be made by TDC.

A holding that TDC is financially responsible does not mean that it is relieved of the statutory duty to house TDC-ready prisoners. It means only that if by default TDC refuses to do so and the counties shoulder the responsibility where TDC has failed, then the counties must be reimbursed.

Conclusion

I would like to conclude this letter decision with a passage from a recent opinion by Justice Keltner in *Tarrant County Commissioner's Court, et al. v. Markham*, No. 2-89-097-CV (Tex. App. — Ft. Worth, September 28, 1989, n.w.h.) (not yet reported). While the opinion deals with Tarrant County jail overcrowding, the following passage is otherwise completely applicable to this case:

> All the parties admit that [the counties' jails] are over-crowded. Much of this blame is due to the failure of the State of Texas to meet its obligations to house inmates who have been committed to the Texas Department of Corrections (T.D.C.) by the order of state courts. *See* Tex. Code Crim. Proc. Ann. art. 42.09 (Vernon Supp. 1989).
>
> The sad truth is that the State of Texas fails to meet its obligations to incarcerate convicted felons because of the state's settlement agreement in the well-known *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir.

1982). By its settlement, the State of Texas made several agreements regarding the incarceration of inmates, including an agreement to limit the inmate population incarcerated in T.D.C. In order to meet its obligations under the *Ruiz* settlement, the state has adopted a policy of refusing to accept inmates from county jails, committed to T.D.C., as is the state's obligation under law.

> The unhappy result is that there are two prison systems in Texas. One is operated "on the books" by T.D.C. and appears to meet the state's obligations under *Ruiz*. This prison system is financed by the State of Texas out of the state budget. The second Texas prison system is less visible to the public eye; but it exists in increasingly overcrowded county jails. In this system, inmates who have been committed to T.D.C. by state courts, are forced to languish in jails of the various counties throughout the state, because of the state's failure to accept the inmates committed to T.D.C. As a result, this second system is not financed out of the state's budget. Instead, these inmates committed to the T.D.C. are incarcerated at the cost of the various counties throughout Texas.
>
> The costs of these efforts are being borne by. . .County taxpayers for a function which is properly that of the State of Texas.

This holding is not (as suggested by TDC) an attempt by the court to substitute its own plan for dealing with prison overcrowding for the plan of the Legislature adopted in H.B. 2335.

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It is purely a determination that under the statutes as they now exist TDC has not been relieved of its responsibility to take felons committed to its custody. If the Legislature wishes to relieve TDC of that responsiblity, perhaps it may do so, but it must do so expressly. Until that time, TDC must comply with its obligation to take the prisoners or reimburse counties for housing and caring for them on its behalf.

This decision does not reach the question of the effect of the allocation formula on TDC's duty to take the prisoners or reimburse the Counties. The allocation formula required under art. 6166a-4 has not yet taken effect; therefore, the question is not before me. Will TDC's refusal to take prisoners from Counties pursuant to the statutorily mandated formula mean that the prisoners will be "committed" to the county jails "by lawful authority."? If so, will TDC then be relieved of its financial obligations under the reasoning expressed in Attorney General Opinion Nos. JM-615, 730 and 743? These, and possibly other questions are not now ripe for decision and will not be reached until they are.

I request that counsel for the Counties prepare a draft of a judgment in line with this decision and submit it to me for signature after approval as to form by opposing counsel.

Thank you.

Very truly yours,

s/ Joseph H. Hart
JOSEPH H. HART
Judge, 126th District Court
Travis County, Texas

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JHH/jw
cc: Mr. John Dickson
Travis County District Clerk

APPENDIX F — LETTER DECISION DATED AUGUST 24, 1989 — *THE COUNTY OF NUECES v. TEXAS BOARD OF CORRECTIONS*

SEAL OF THE STATE OF TEXAS

JOSEPH H. HART
District Judge
126th Judicial District Court

P.O. BOX 1748
AUSTIN, TEXAS 78767

August 24, 1989

Mr. Carlos Valdez
County Attorney
Nueces County Courthouse
901 Leopard, Room 206
Corpus Christi, Texas 78401-3680

Mr. Robert Ozer
Assistant Attorney General
Chief, Class Action Section
Enforcement Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548

Mr. Steve Bickerstaff
Ms. Anne Clark Snell
BICKERSTAFF, HEATH & SMILEY
San Jacinto Center
Suite 1800
98 San Jacinto Blvd.
Austin, Texas 78701-4039

Appendix F

Re: Cause No. 452,071; The County of Nueces,
Texas vs. Texas Board of Corrections, et al.

Dear Counsel:

I have decided that the suggestion of mootness filed by defendant should be denied. I request that Mr. Valdez prepare a draft of an order in line with this decision and submit it to me for signature after approval as to form by other counsel.

As things now stand, we will proceed with the hearing on October 2, 1989 at 9:00 a.m. on the question of impossibility. Please try to stipulate to as many uncontested facts as possible so as to reduce unnecessary in-court testimony. Also, please let us know your current estimates of length of time for the hearing.

Thank you.

Very truly yours,

s/ Joseph H. Hart
JOSEPH H. HART
Judge, 126th District Court
Travis County, Texas

JHH/jw
cc: Mr. John Dickson
Travis County District Clerk

APPENDIX G — FINAL JUDGMENT FILED AUGUST 2, 1991 — *HARRIS COUNTY v. THE STATE OF TEXAS*

No. 475,468

IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS

126TH JUDICIAL DISTRICT

HARRIS COUNTY, TEXAS

Plaintiff/Relator

vs.

THE STATE OF TEXAS; ANN RICHARDS, GOVERNOR OF THE STATE OF TEXAS; TEXAS DEPARTMENT OF CRIMINAL JUSTICE; JAMES LYNAUGH, DIRECTOR; TEXAS BOARD OF CRIMINAL JUSTICE; CHARLES T. TERRELL; JERRY H. HODGE; F. L. STEPHENS; BEN GALLANT, JR.; JAMES ELLER; MAIME MOORE PROCTOR; ROBERT MANN; AND ALLAN B. POLUNSKY; AS MEMBERS OF THE TEXAS BOARD OF CRIMINAL JUSTICE

Defendants/Respondents

FINAL JUDGMENT

BE IT REMEMBERED that on the 20th day of May, 1991, the above entitled and numbered cause came on for hearing before this Court, and Plaintiff/Relator Harris County appeared by and through its attorney of record, and Intervenor Montgomery County appeared by and through its attorney of record, and Defendants/Respondents The State of Texas; Ann Richards,

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Governor of the State of Texas; Texas Department of Criminal Justice; James Lynaugh, Director; Texas Board of Criminal Justice; Charles T. Terrell; Jerry H. Hodge; F. L. Stephens; Ben Gallant, Jr.; James Eller; Maime Moore Proctor; Robert Mann; and Allan B. Polunsky; as members of the Texas Board of Criminal Justice, appeared by and through their attorneys of record.

By an order signed April 25, 1991, this Honorable Court granted partial summary judgment in favor of Plaintiff/Relator Harris County, and Intervenor Montgomery County against Defendants/Respondents, finding and holding that Defendants/Respondents were and are liable to Plaintiff/Relator and Intervenor for the cost of caring for, housing, incarcerating and transporting TDC ready convicted felons both in the past and in the future; and that Defendants/Respondents non-discretionary, mandatory and ministerial duty to house, care for, incarcerate and transport such convicted felons was not and is not in any way relieved or excused or in any way imposed upon any other entity by virtue of House Bill 2335 and/or Article 6166a-4, V.A.C.S., and/or the allocation formula, 37 TAC 152.3, nor were Defendants/Respondents in any way excused from financial liability and responsibility for such convicted felons, nor was such financial liability and responsibility imposed upon any other entity; and that by virtue of its scheduled admissions policy and allocation formula the Defendants/Respondents have enjoyed the use and benefit of ad valorem tax money collected by Harris County and Montgomery County by using such ad valorem tax money to carry out Defendants/Respondents non-discretionary, mandatory and ministerial duties in violation of the Constitution of the State of Texas; and that by doing so Defendants/Respondents have deprived Plaintiff/Relator Harris County and Intervenor Montgomery County of the use of their

ad valorem tax revenues for county purposes; and that Plaintiff/Relator Harris County and Intervenor Montgomery County are entitled to a writ of mandamus ordering the Defendants/Respondents to reimburse and compensate Harris County and Montgomery County for carrying out Defendants/Respondents mandatory, non-discretionary and ministerial duties and responsibilities by housing, caring for, incarcerating and transporting convicted felons both in the past and in the future.

The issue of liability having been determined by the court's summary judgment of April 25, 1991 as aforesaid, on the 20th day of May, 1991, a jury having been previously demanded, and a jury consisting of twelve good and lawful jurors having been duly impaneled, the case proceeded to trial on the issue of damages.

At the conclusion of the evidence, the court submitted the case to the jury on questions. The jury did retire to deliberate its verdict, and returned into open court the following verdict and answers to the following questions.

> "STATE PRISONER" means prisoners sentenced to the state penitentiary.
>
> "PRISONER DAY" means each day or a part of a day that a state prisoner is held in a county jail, but does not include days spent in a county jail by a state prisoner who (1) is returned to county jail on a bench warrant and is awaiting further proceedings; (2) is awaiting trial in state court on the remainder of multiple charges; (3) is awaiting a parole revocation hearing; (4) is being held on federal detainers awaiting trial in federal court;

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and (5) is awaiting a pending appeal of a sentence of ten years or less and who has not exercised his or her right to be transferred to the state penitentiary immediately upon sentencing.

QUESTION NO. 1

For each state prisoner, how many prisoner days after sentencing would be reasonable for the state to accept state prisoners?

In answering this question, you may consider only the following elements and none others.

a. The reasonable amount of time after sentencing that it would take the counties to prepare the paper work required for transfer to the state, if the state were not restricting admissions of state prisoners.

b. The reasonable amount of time that it would take to arrange for transportation of such prisoners to the state, if the state were not restricting admissions of state prisoners.

Answer by indicating the number of days for each county.

Answer:

HARRIS COUNTY	5 days
MONTGOMERY COUNTY	7 days

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QUESTION NO. 2

Between September 28, 1987 and April 30, 1991, how many prisoner days, if any, did the counties hold state prisoners?

Do not include in your answer the time you have found in answer to question number one to be reasonable for the state to accept state prisoners.

Answer by giving the total number of prisoner days, if any, for each county.

Answer:

HARRIS COUNTY	2,310,214 days
MONTGOMERY COUNTY	65,256 days

QUESTION NO. 3

What is the reasonable value per prisoner day, if any, of the services provided by the counties in holding state prisoners?

Answer in dollars and cents, if any, for each county.

Answer:

HARRIS COUNTY	$21.34
MONTGOMERY COUNTY	$17.31

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Thereafter, said verdict was duly received in open court and ordered filed, and the Court being of the opinion that judgment herein should be rendered in accordance with its summary judgment of April 25, 1991 and the aforesaid verdict of the jury, it is the opinion of this court that judgment should be rendered in favor of Plaintiff/Relator Harris County and Intervenor Montgomery County and that a writ of mandamus should be issued to compel Defendants/Respondents to perform their non-discretionary, mandatory and ministerial duty, it is therefore

ORDERED, ADJUDGED and DECREED:

1. That a pre-emptory writ of mandamus issue directing and commanding Defendants/Respondents The State of Texas; Ann Richards, Governor of the State of Texas; Texas Department of Criminal Justice; James Lynaugh, Director; Texas Board of Criminal Justice; Charles T. Terrell; Jerry H. Hodge; F. L. Stephens; Ben Gallant, Jr.; James Eller; Maime Moore Proctor; Robert Mann; and Allan B. Polunsky; as members of the Texas Board of Criminal Justice to cause the Texas Department of Criminal Justice to provide for the care and custody of all prisoners sentenced by a court of competent jurisdiction to the Institutional Division of the Texas Department of Criminal Justice or to its predecessor, the Texas Department of Corrections, or to compensate Plaintiff/Relator Harris County at a rate of $21.34 per day and Intervenor Montgomery County at a rate of $17.31 per day for each such prisoner held in Harris County's or Montgomery County's jails and to raise any revenue necessary to pay such compensation.

2. That Defendants/Respondents' duty to provide for the care and custody of prisoners sentenced to the Institutional Division of the Texas Department of Criminal Justice or to its

predecessor, the Texas Department of Corrections, or to pay compensation to Harris County and Montgomery County for holding such prisoners shall begin five calendar days after issuance of judgment sentencing and committing such prisoners to the Texas Department of Criminal Justice, or to its predecessor the Texas Department of Corrections in Harris County, and seven days after issuance of such judgment in Montgomery County.

3. That Defendants/Respondents shall pay to Harris County $49,299,966.76 and to Montgomery County $1,129,581.36 as the aggregate amount of compensation due to Harris County and Montgomery County for the period beginning September 28, 1987 up to and including April 30, 1991 for holding prisoners that were Defendants/Respondents' responsibility under this judgment.

4. That Defendants/Respondents shall pay to Harris County and Montgomery County compensation in accordance with this judgment for prisoners held by each county on or after May 1, 1991 that are the responsibility of Defendants/Respondents. In computing the prisoner days for which compensation is owed from Defendants/Respondents to Harris County and Montgomery County, the county shall exclude days spent in the county jail by a prisoner who (1) is returned to county jail on a bench warrant and is awaiting further proceedings; (2) is awaiting trial in state court on the remainder of multiple charges; (3) is awaiting a parole revocation hearing; (4) is being held on federal detainers awaiting trial in federal court; and (5) is awaiting a pending appeal of a sentence of ten years or less and who has not exercised his or her right to be transferred to the state penitentiary immediately upon sentencing.

5. That Harris County and Montgomery shall submit invoices to Defendants/Respondents for payment of compensation for

prisoners held by the counties on or after May 1, 1991, for which Defendants/Respondents are responsible under this judgment.

6. That Harris County's and Montgomery County's invoices for compensation for the period from and after May 1, 1991 to the date of entry of this judgment shall be presented to Defendants/Respondents by each county by submitting the invoice to the Director of the Texas Department of Criminal Justice by the last day of the month following the month in which this judgment is entered. Thereafter, the counties' invoices for compensation shall be presented by each county to Defendants/Respondents by submitting the invoice to the Director of the Texas Department of Criminal Justice by the last day of the month following the month in which compensation to the county accrues under this judgment.

7. That a constructive trust is hereby imposed on all funds now and hereafter found, deposited and/or on deposit in the State treasury for the purposes of satisfying this judgment and reimbursing Harris County and Montgomery County for housing, caring for, incarcerating and transporting state prisoners both in the past and in the future.

8. That the judgment hereby rendered shall bear post-judgment interest in accordance with Tex. Rev. Civ. Stat. Ann. art. 5069-1.05 (Vernon Supp. 1990) at the rate of 10% from the date of judgment until paid.

9. That the judgment hereby rendered shall bear pre-judgment interest in accordance with Tex.Rev.Civ.Stat.Ann. art. 5069-1.05 (Vernon Supp. 1990) at the rate of 10% from June 6, 1990 through the date the judgment is signed.

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10. That all costs of court be taxed against Defendants/Respondents.

It is further ORDERED that Defendants/Respondents shall not by this judgment be relieved of carrying out their obligations under any other relevant order issued by a court of competent jurisdiction, including the agreed orders Defendants/Respondents have entered into in *Ruiz v. Lynaugh*, No. 78-087-CA; provided, however, that Defendants/Respondents shall not be precluded from seeking modifications to such orders.

SIGNED this 2nd day of August, 1991.

s/ Joseph H. Hart
JOSEPH H. HART
JUDGE, 126TH JUDICIAL
DISTRICT COURT
TRAVIS COUNTY, TEXAS

APPROVED AND ENTRY REQUESTED:

MIKE DRISCOLL
Harris County Attorney

By Frank Sanders
FRANK SANDERS, SBN 17588500
Assistant County Attorney
1001 Preston, Suite 634
Houston, Texas 77002
(713) 221-7961
Fax # (713) 225-8924

ATTORNEYS FOR PLAINTIFF/RELATOR
HARRIS COUNTY, TEXAS

Appendix G

D. C. JIM DOZIER
Montgomery County Attorney

By Steve McKeithen
STEVE McKEITHEN, SBN 13700550
Assistant County Attorney
301 North Main St., Suite 300
Conroe, Texas 77301
(409) 539-7828

ATTORNEYS FOR INTERVENOR
MONTGOMERY COUNTY, TEXAS

APPENDIX H — PEREMPTORY WRIT OF MANDAMUS FILED AUGUST 2, 1991 — *HARRIS COUNTY v. THE STATE OF TEXAS*

IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS

126TH JUDICIAL DISTRICT

NO. 475,468

HARRIS COUNTY, TEXAS

Plaintiff/Relator

v.

THE STATE OF TEXAS; ANN RICHARDS, GOVERNOR OF THE STATE OF TEXAS; TEXAS DEPARTMENT OF CRIMINAL JUSTICE; JAMES LYNAUGH, DIRECTOR; TEXAS BOARD OF CRIMINAL JUSTICE; CHARLES T. TERRELL; JERRY H. HODGE; F. L. STEPHENS; BEN GALLANT, JR.; JAMES ELLER; MAIME MOORE PROCTOR; ROBERT MANN; AND ALLAN B. POLUNSKY; AS MEMBERS OF THE TEXAS BOARD OF CRIMINAL JUSTICE

Defendants/Respondents

PEREMPTORY WRIT OF MANDAMUS

On April 25, 1991, this Court granted partial summary judgment in the above numbered and styled cause finding the Respondents, The State of Texas; Ann Richards, Governor of the State of Texas, Texas Department of Criminal Justice; James Lynaugh, Director; Texas Board of Criminal Justice; Charles T.

Terrell; Jerry H. Hodge; F. L. Stephens; Ben Gallant, Jr.; James Eller; Maime Moore Proctor; Robert Mann; and Allan B. Polunsky; as members of the Texas Board of Criminal Justice have a ministerial, mandatory, nondiscretionary duty to take custody of inmates sentenced by a trial court to the custody of Texas Department of Corrections or its successor agency Texas Department of Criminal Justice.

This Court further found that Respondents had not established legal impossibility or any of the defenses that would preclude issuance of a writ of mandamus and that pursuant to a jury verdict returned May 30, 1991, Respondents have a duty to reimburse the Relator Harris County, Texas and the Intervenor Montgomery County, Texas ("Counties") by paying reasonable compensation in the amount of $21.34 as to Harris County and $17.31 as to Montgomery County per day for the care, treatment, feeding, clothing and management of the inmates that the State should have taken. The compensation should begin to accrue five days in the case of Harris County and accrue seven days in the case of Montgomery County after the date of the judgment and sentence of the court ordering confinement in the Texas Department of Criminal Justice. Respondents have a duty to take all actions necessary to obtain funds required to pay such amounts of compensation.

The Counties have demanded that Respondents perform their duty to take inmates and Respondents have unjustly refused and still refuse to take or make provisions for the inmates.

Respondents show by their acts of refusal to perform the ministerial duty to take the inmates that it is futile for the Counties to issue formal demands for compensation and this Court dispenses with the need for a formal demand and refusal.

Appendix H

The Respondents' failure to fulfill their duty as outlined above has resulted in manifest injury to the Counties.

Therefore, this Court commands Respondents to provide for the care and custody of all prisoners sentenced by a court of competent jurisdiction to the Texas Department of Criminal Justice or its predecessor the Texas Department of Corrections, or to compensate the Counties at the rate of $21.34 as to Harris County and $17.31 as to Montgomery County per day for each such prisoner held in the Counties' jails after five days from the date of judgment and sentence in the case of Harris County and after seven days from the date of judgment and sentence in the case of Montgomery County.

This Court further commands Respondents to pay to the Counties the aggregate amount of compensation at the rate of $21.34 per day as to Harris County and $17.31 per day as to Montgomery County which has accrued for all periods up to and including April 30, 1991, for holding prisoners that Respondents failed to provide for under Repondents' duty to provide for the care and custody of all persons sentenced by a court of competent jurisdiction to the Texas Department of Criminal Justice or its predecessor the Texas Department of Corrections and to continue paying amounts that become due until such time as Rspondents carry out their duty as outlined above. The aggregate amounts due each County are:

Harris	$49,299,966.76
Montgomery	$1,129,581.36

Further, this Court commands Respondents to take all action necessary to obtain funds to pay reasonable compensation.

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You are hereby further commanded to make return to this writ before this Court on November 4, 1991 at the Travis County Courthouse, stating how you have executed or what you have done in compliance to this writ and have you then and there this writ.

SIGNED this 2nd day of August, 1991.

s/ Joseph H. Hart
JOSEPH H. HART, JUDGE
126th Judicial District Court
Travis County, Texas

APPENDIX I — SUPPLEMENTAL COMPLAINT DATED SEPTEMBER 15, 1989 — *ALBERTI v. JOHNNY KLEVENHAGEN*

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-72-1094

LAWRENCE R. ALBERTI, ET AL.,

Plaintiffs,

V.

JOHNNY KLEVENHAGEN, ET AL.,

Defendants.

and

WILLIAM P. CLEMENTS; JAMES LYNAUGH; CHARLES T. TERRELL; BEN J. GALLANT, ALLAN BRUCE POLUNSKY; JAMES M. ELLER; F. L. "STEVE" STEPHENS; MAMIE MOORE PROCTOR ROBERT MANN; JERRY H. HODGES; HENRY B. KEENE, RUBEN M. TORRES, CHRIS A. MEALY, WINONA W. MILES, JAMES H. GRANBERRY, WENDELL A. ODOM AND THE STATE OF TEXAS

Rule 19 Defendants.

SUPPLEMENTAL COMPLAINT

LAWRENCE R. ALBERTI, et al., and the class composed

of all persons in the Harris County who are under the custodianship of the Harris County Sheriff, respectfully allege as follows:

I.

ADDITIONAL DEFENDANTS

WILLIAM P. CLEMENTS is the Governor of the State of Texas. He is sued in his official capacity.

JAMES LYNAUGH is the Director of the Texas Department of Corrections. He is sued in his official capacity.

CHARLES T. TERRELL is of the Texas Board of Criminal Justice. He is sued in his official capacity.

BEN GALLANT is a board member on the Texas Board of Criminal Justice. He is sued in his official capacity.

MAMIE MOORE PROCTOR is a board member of the Texas Board of Criminal Justice. He is sued in his official capacity.

ALLAN BRUCE POLUNSKY is a board member on the Texas Board of Criminal Justice. He is sued in his official capacity.

JAMES M. ELLER is a board member of the Texas Board of Criminal Justice. He is sued in his official capacity.

F. L. "STEVE" STEPHENS is a board member of the Texas Board of Criminal Justice. He is sued in his official capacity.

ROBERT MANN is a board member of the Texas Board

of Criminal Justice. He is sued in his official capacity.

JERRY H. HODGES is a board member of the Texas Board of Criminal Justice. He is sued in his official capacity.

HENRY B. KEENE is the Chairman of the Texas Board of Pardons and Paroles. He is sued in his official capacity.

RUBEN M. TORRES is the Vice Chairman of the Texas Board of Pardons and Paroles. He is sued in his official capacity.

CHRIS A. MEALY is a board member of the Texas Board of Pardons and Paroles. He is sued in his official capacity.

WINONA W. MILES is a board member of the Texas Board of Pardons and Paroles. He is sued in his official capacity.

JAMES H. GRANBERRY is a board member of the Texas Board of Pardons and Paroles. He is sued in his official capacity.

WENDELL A. ODOM is a board member of the Texas Board of Pardons and Paroles. He is sued in his official capacity.

THE STATE OF TEXAS is a sovereign state with ultimate responsibility for the care and custody of convicted felons.

II.

JURISDICTION

The Court has continuing jurisdiction over this matter and the County of Defendants by virtue of the Consent Judgment entered in this civil action on February 4, 1975. Additionally the

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Court has jurisdiction over the State of Texas Defendants by virtue of 42 U.S.C. § 1983, 28 U.S.C. §§ 1331 and 1343, and the All Writs Act, 28 U.S.C. § 1651.

III.

EVENTS OCCURRING SINCE ENTRY OF THE CONSENT JUDGMENT

On February 4, 1975, Plaintiffs and the County Defendants executed and the Court approved a Consent Judgment, whereby the County Defendants agreed to reduce the overcrowding in the Harris County Jail. Through this consent Judgment and a December 16, 1975, Memorandum and Opinion, *Alberti v. Klevenhagen,* 406 F. Supp. 649 (S.D. Tex. 1975), the Court retained jurisdiction to enter any interim orders necessary to effectuate compliance with the Consent Judgment and has monitored such compliance, entering other remedial orders.

On April 28, 1987, the Court appointed a Special Master and two Monitors ("the Monitors") to oversee the County Defendants' compliance efforts. *Alberti v. Klevenhagen,* 660 F. Supp. 605 (S.D. Tex. 1987). On December 17, 1987, the Court entered an Order which directed the Monitors to assess the overcrowding problem in the Jail. On September 12, 1988, the Monitors filed their Findings of Fact and Recommendations, determining that:

> The Jail is dangerously overcrowded. All systems are impossibly stressed, including food service, programming, elevators, recreation, classification, maintenance, visiting, supplies of clothing and bedding, security, medical care and mental health

> services. So far these stressed systems have not broken down completely under the population pressures, but the Monitors believe that there is no elasticity left in the institution and its service systems.

The Monitors have recommended (Monitors' Recommendations on Population April 11, 1989) that the Court, within 30 days from entry of the order impose a maximum capacity on the Harris County jail is an overall population of 7,000 inmates with no more than 1,000 housed in the Detention Center; within 90 days of the entry of the Courts' Order, reducing the total inmate population to 6,400, with no more than 900 being housed in the Detention Center; within 180 days, of the entry of the Courts' Order, reducing the total population of Harris County facilities to 5,800, with no more than 810 being housed in the Detention Center; within 270 days, reduce the total inmate population of Harris County facilities to 5,200, with no more than 810 being housed in the Detention Center; with completion of the new jail, or in any case no later than June 1, 1991, the defendant must reduce the population of all of their facilities to 100 percent of their design capacity of 8,732 (3,505 for the Jail, 810 for the Detention Center, 417 for the 301 Building; 4,000 for the new jail) by June 1, 1991. Moreover in open Court on September 13, 1989, at a hearing where constitutionality was at issue, the Attorney General of Texas appearing on behalf of the State of Texas judicially conceded that the living conditions at the Harris County Jail including overcrowding are so egregious as to be in violation of the United States Constitution. Likewise on September 12, 1989, in open Court at the same hearing, the County Attorney appearing on behalf of Defendant Klevenhagen conceded that the living conditions at the Harris County Jail including overcrowding are so egregious as to be in violation of the United States Constitution.

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IV.

INVOLVEMENT OF THE STATE DEFENDANTS

Despite its statutory responsibility to accept convicted felons into its facilities, TEX. CODE CRIM. PROC. ANN. art. 42.09; TEX. PENAL CODE §§ 12.32 - 12.34; *Todd v. State*, 598 F.2d 286, 292 (Tex. Crim. App. 1980), the State of Texas by and through its officials has refused to accept its prisoners presently incarcerated in the Harris County Jail.

William Clements, Governor of the State of Texas, is empowered to invoke the Prison Management Act by "certify[ing] that an emergency overcrowding situation exists, and . . . order[ing] the director [of TDC] to credit not more than 90 days of administrative good time to all eligible inmates." TEX. REV. CIV. STAT. ANN. art. 61840. He has, however, taken no steps to invoke the Act and alleviate TDC's overcrowding, which in turn would reduce the numbers held in the Harris County Jail.

James Lynaugh, Director of the Texas Department of Corrections; Charles T. Terrell, of the Texas Board of Criminal Justice; Ben J. Gallant; Allan Bruce Polunsky, James M. Eller, F. L. "Steve" Stephens, Mamie Moore Proctor, Robert Mann and Jerry H. Hodges, Board Members on the Texas Board of Criminal Justice, are vested with the exclusive management and control of TDC. TEX. REV. CIV. STAT. ANN. art. 6166q. Furthermore, these individuals, acting in their official capacities, are responsible for "mak[ing] suitable provisions and regulations for the safe and speedy transportation of prisoners from counties where sentenced to the State penitentiary by the sheriffs of such respective counties if such sheriffs are willing to perform such services . . ." TEX. REV. CIV. STAT. ANN. art. 6166r.

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Henry B. Keene, Chairman of the Texas Board of Pardons and Paroles, Ruben M. Torres, Chris A. Mealy, Winona W. Miles, James H. Granberry, Wendell A. Odom, Board Members on the Texas Board of Pardons and Paroles are vested with the exclusive authority to administer the provisions of the Adult Probation, Parole, and Mandatory Supervision Law, Tex. Crim. Proc. Ann. art. 42.12 and to determine which prisoners shall be paroled from TDC, the conditions of their parole and mandatory supervision including the degree and intensity of supervision a prisoner released on parole or released to mandatory supervision should receive.

Although a substantial number of persons currently incarcerated in the Harris County Jail are convicted felons who are eligible for parole, their paroles are being delayed because of the lack of prompt processing by the Texas Board of Pardons and Paroles.

Convicted felony jail inmates are denied the same consideration for good time and trustee time as inmates transferred to the penitentiary (Institutional Division). Inmates in jail are not given credit for good time presented through the Prison Management Act. Jail inmates who are jail trustees are not awarded additional trustee time credits that they would earn if they had been transferred to the penitentiary. Awarding good time and trustee time based upon whether a person is sent by the Sheriff to the penitentiary (Institutional Division) is an unreasonable classification and constitutes a violation of the equal protection clause of the fourteenth amendment.

V.

CONSTITUTIONAL BASIS

The foregoing actions by the Rule 19 defendants have cause

plaintiffs to suffer deprivations of the rights secure by the fourteenth amendment (due process and equal protection) and the eighth amendment (cruel and unusual punishment) and their participation is necessary to achieve complete relief.

WHEREFORE, Plaintiffs pray that the above-named State officials be cited to appear and that upon final hearing of this matter, the Court entered such Orders as are appropriate to eliminate the unconstitutional conditions that exist at the Harris County Jail facilities and to effectuate full compliane with the Consent Judgment entered by this Court on February 4, 1975.

Plaintiffs further pray for such other and further relief, including reasonable attorneys fees and costs, to which Plaintiffs may show themselves justly entitled.

Respectfully submitted,

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CO-COUNSEL FOR PLAINTIFF

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of September, 1989, a true and correct copy of the foregoing Plaintiffs' Supplemental Complaint was served upon the following counsel of record by Hand Delivery in the courtroom of Judge James DeAnda:

Mr. Harold Streicher
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Houston, Texas 77002

Mr. Roderick Lawrence
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Capitol Station
Austin, Texas 78711

s/ James T. Oitzinger
JAMES T. OITZINGER

APPENDIX J — THIRD PARTY COMPLAINT FILED JANUARY 13, 1989 — *ALBERTI v. SHERIFF OF HARRIS COUNTY (WITHOUT EXHIBITS)*

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

CIVIL ACTION NO. 72-H-1094

LAWRENCE R. ALBERTI, ET AL.,

Plaintiffs

vs.

THE SHERIFF OF HARRIS COUNTY, ET AL.,

vs.

WILLIAM P. CLEMENTS; JAMES LYNAUGH; CHARLES T. TERRELL; DERALYN R. DAVIS; JOSEPH V. LAMANTIA; ALLAN BRUCE POLUNSKY; JAMES M. ELLER; F.L. "STEVE" STEPHENS, DENNIS R. HENDRIX; ROBERT MANN; JERRY H. HODGES (each in his or her official capacity).

THIRD PARTY COMPLAINT

THE SHERIFF OF HARRIS COUNTY, TEXAS, and HARRIS COUNTY, TEXAS, by and through its COMMISSIONERS COURT, DEFENDANTS and THIRD PARTY PLAINTIFFS herein, complaining of William P. Clements, Governor of the State of Texas; James Lynaugh,

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Director of the Texas Department of Corrections; Charles T. Terrell, Chairman of the Texas Board of Corrections; Deralyn R. Davis, Joseph V. Lamantia, Allan Bruce Polunsky, James M. Eller, F.L. "Steve" Stephens, Dennis R. Hendrix, Robert Mann and Jerry H. Hodges, Board Members on the Texas Board of Corrections, each in his or her official capacity, respectfully allege as follows:

I. Parties

1. Johnny Klevenhagen is the SHERIFF OF HARRIS COUNTY, TEXAS, and a defendant in the underlying action filed pursuant to 42 U.S.C.A. § 1983 (West 1981).

2. HARRIS COUNTY, TEXAS, a political subdivision of the State, Jon Lindsay, the HARRIS COUNTY JUDGE, and Harris County Commissioners E.A. Lyons, Jim Fonteno, El Franco Lee and Steve Radack, all of whom are members of the HARRIS COUNTY COMMISSIONERS COURT, which is the governing body of Harris County, Texas, are defendants in the underlying action filed pursuant to 42 U.S.C.A § 1983 (West 1981).

3. WILLIAM P. CLEMENTS is the Governor of the State of Texas, and may be served by mail at P.O. Box 12428, State Capitol, Austin, Texas 78711.

4. JAMES LYNAUGH is the Director of the Texas Department of Corrections and may be served by mail at P.O. Box 99, Huntsville, Texas 77340.

5. CHARLES T. TERRELL is the Chairman of the Texas Board of Corrections and may be served by mail at P.O. Box 35948, Dallas, Texas 75235.

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6. DERALYN R. DAVIS is a board member on the Texas Board of Corrections and may be served by mail at P.O. Box 15126, Fort Worth, Texas 76110.

7. JOSEPH V. LAMANTIA is a board member on the Texas Board of Corrections and may be served by mail at P.O. Box 1003, Weslaco, Texas 78596.

8. ALLAN BRUCE POLUNSKY is a board member on the Texas Board of Corrections and may be served by mail at 1 Forum 16th Floor, 8000 Interstate Highway 10 West, San Antonio, Texas 78230.

9. JAMES M. ELLER is a board member on the Texas Board of Corrections and may be served by mail at P.O. Box GJ, College Station, Texas 77841.

10. F.L. "STEVE" STEPHENS is a board member on the Texas Board of Corrections and may be served by mail at P.O. Box 5581, San Angelo, Texas 76902.

11. DENNIS R. HENDRIX is a board member on the Texas Board of Corrections and may be served by mail at P.O. Box 2521, Houston, Texas 77252.

12. ROBERT MANN is a board member on the Texas Board of Corrections and may be served by mail at P.O. Box 8436, Waco, Texas 76714.

13. JERRY H. HODGES is a board member on the Texas Board of Corrections and may be served by mail at 25 Medical Drive, Amarillo, Texas 79106.

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II. JURISDICTION

14. The Court has jurisdiction pursuant to 42 U.S.C.A. § 1343(3) (West Supp. 1988).

15. Additionally, the Court has pendent jurisdiction of the claims against the Third Party Defendants in that the Third Party Complaint arises out of the matters alleged in the Original Complaint filed in this cause.

III. CAUSE OF ACTION

16. On August 14, 1972, Plaintiffs filed a Complaint against Defendants, contending, *inter alia*, that the overcrowded conditions existing in the Harris County Jail violated their constitutional rights. *See* Exhibit A. On February 4, 1975, the parties executed and the Court approved a Consent Judgment, whereby Defendants agreed to reduce the overcrowding in the Harris County Jail. *See* Exhibit B. Through this Consent Judgment and a December 16, 1975, Memorandum and Opinion, *Alberti v. Kelvenhagen*, 406 F. Supp. 649 (S.D. Tex. 1975), the Court retained jurisdiction to enter any interim orders necessary to effectuate compliance with the Consent Judgment and has monitored such compliance, entering other remedial orders. *See* Exhibit B at 5.

17. On April 28, 1987, the Court appointed a Special Master and two Monitors ("the Monitors") to oversee the Defendants' compliance efforts. *Alberti v. Klevenhagen*, 660 F. Supp. 605 (S.D Tex. 1987). On December 17, 1987, the Court entered an Order which directed the Monitors to assess the overcrowding problem in the Jail. On September 12, 1988, the Monitors filed their Findings of Fact and Recommendations, determining that:

> The Jail is dangerously overcrowded. All systems are impossibly stressed, including food service, programming, elevators, recreation, classification, maintenance, visiting, supplies of clothing and bedding, security, medical care and mental health services. So far these stressed systems have not broken down completely under the population pressures, but the Monitors believe that there is no elasticity left in the institution and its service systems.

See Exhibit C at 26. The Monitors stressed that the State of Texas, not the Defendants, caused and was responsible for the current overcrowding dilemma:

> It should be re-emphasized in the strongest of terms that Harris County has addressed its responsibilities fully and well. The culprit here is the State of Texas which has failed to provide adequate constitutional housing for its offender population and has gotten away so far with simply exporting the results of its failure to the counties. The anomalous result is that while the State is subject to a 95 percent cap by one federal district court, one of its subdivisions is being pushed to demand permission of another federal district court to overpopulate its facilities limitlessly.

See Exhibit C at 28 (emphasis added). The Monitors recommended that the Court impose a ceiling capacity on the Harris County Jail, reducing its overall population to 120 percent of total design capacity within 60 days of the entry of the Court's Order; to 110 percent of total design capacity by the time the 301 San Jacinto

Jail's renovation has been completed; and to 95 percent of total design capacity by June 1, 1991. *See* Exhibit C at 29.

18. On November 8, 1988, the Court entered an Order requiring the SHERIFF to transport and deliver to the Texas Department of Corrections ("TDC") at least 290 "convicted felons ready for transfer to TDC" per week each week beginning December 5, 1988, finding that:

> [D]angerously overcrowded conditions exist in the Harris County correctional facilities [that] have been exascerbated substantially, if not caused primarily or solely, by the failure of TDC to receive convicted felons ready for transfer to the TDC in sufficient numbers and in a sufficiently timely manner to alleviate the overcrowded and dangerous conditions which exist within Harris County correctional facilities. The Court also finds that such circumstances have interfered substantially with the defendants' efforts to achieve compliance with the terms and mandates of the original consent decree and subsequent orders in this case. The court further finds that because of the severe overcrowding conditions presently existing in the Harris County detention facilities, the Sheriff should not be housing convicted felons ready for transfer to the TDC in Harris County correctional facilities for any period of time longer than minimally and reasonably required to complete the paperwork relating to such persons and effectuate their transportation and delivery to TDC.

See Exhibit D at 4 - 5, 6.

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19. Despite its statutory responsibility to accept convicted felons into its facilities, TEX. CODE CRIM. PROC. ANN. art. 42.09 (West Supp. 1988); TEX. PENAL CODE §§ 12.32 - 12.34 (West 1974 & Supp. 1988); *Todd v. State*, 598 F.2d 286, 292 (Tex. Crim. App. 1980), and contrary to the Court's remedial Order concerning Plaintiffs' adjudicated constitutional rights, the State, by and through its officials, has refused to accept its prisoners, stating that "the Texas Department of Corrections will not accept prisoners from Harris County, or any other county of the State of Texas, above the number allocated pursuant to the scheduled admissions policy." *See* Exhibit E.

20. Given this refusal, and without statutory authority to simply release TDC ready felons, *see* TEX. CODE CRIM. PROC. ANN. 42.09 (West Supp. 1988), the SHERIFF and HARRIS COUNTY cannot achieve compliance with the Court's November 8, 1988, Order and protect PLAINTIFFS' adjudicated rights without joining THIRD PARTY DEFENDANTS and securing injunctive relief against them. On December 12, 1988, the Sheriff reported his inability to achieve compliance with the Court's Orders. *See* Exhibit F.

21. William P. Clements, Governor of the State of Texas; James Lynaugh, Director of the Texas Department of Corrections; Charles T. Terrell, Chairman of the Texas Board of Corrections; Deralyn R. Davis, Joseph V. Lamantia, Allan Bruce Polunsky, James Eller, F.L. "Steve" Stephens, Dennis R. Hendrix, Robert Mann and Jerry H. Hodges, Board Members on the Texas Board of Corrections, are liable to THIRD PARTY PLAINTIFFS for THIRD PARTY PLAINTIFFS' inability to comply with the Court's November 8, 1988 Order, which found that dangerously overcrowded conditions exist in the Harris County Jail. *See* Exhibit D at 4 -5.

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22. William Clements, Governor of the State of Texas, is empowered to invoke the Prison Management Act by "certify[ing] that an emergency overcrowding situation exists, and . . . order[ing] the director [of TDC] to credit not more than 90 days of administrative good time to all eligible inmates." TEX. REV. CIV. STAT. ANN. art. 6184o (West Supp. 1988). He has, however, taken no steps to invoke the Act and alleviate TDC's overcrowding, which in turn would reduce the numbers held in the Harris County Jail.

23. James Lynaugh, Director of the Texas Department of Corrections; Charles T. Terrell, Chairman of the Texas Board of Corrections; Deralyn R. Davis, Joseph V. Lamantia, Allan Bruce Polunsky, James M. Eller, F.L. "Steve" Stephens, Dennis R. Hendrix, Robert Mann and Jerry H. Hodges, Board Members on the Texas Board of Corrections, are vested with the exclusive management and control of TDC. TEX. REV. CIV. STAT. ANN. art. 6166g (West 1970). Furthermore, these individuals, acting in their official capacities, are responsible for "mak[ing] suitable provision and regulations for the safe and speedy transportation of prisoners from counties where sentenced to the State penitentiary by the sheriffs of such respective counties if such sheriffs are willing to perform such services. . ." TEX. REV. CIV. STAT. ANN. art. 6166r (West 1970). Notwithstanding the fact that the Sheriff has demonstrated his willingness to perform such services, *see* Exhibit F, THIRD PARTY DEFENDANTS have failed to make such provisions and regulations, and in fact have established a transfer system which balances their population by forcing the Harris County Jail to become a state penitentiary.

24. By reason of the THIRD PARTY DEFENDANTS' failure to accept their prisoners as required by state law, the THIRD PARTY DEFENDANTS are liable to the THIRD PARTY

PLAINTIFFS, who cannot achieve compliance with the Court's Orders and protect PLAINTIFFS' adjudicated constitutional rights. The THIRD PARTY PLAINTIFFS have no adequate remedy at law and will suffer irreparable injury if the relief requested is not granted.

IV. RELIEF

WHEREFORE, premises considered, THIRD PARTY PLAINTIFFS demand judgment against the THIRD PARTY DEFENDANTS, each in his or her official capacity, and their agents, employees and those acting in active concert with them, ordering them to immediately remove from the Harris County Jail, all persons who are currently "convicted felons ready for transfer to TDC", as defined in the Court's November 8, 1988 Order, and to continue thereafter to remove from the Harris county Jail all persons who become "convicted felons ready for transfer to TDC." *See* Exhibit D at 5 - 6. THIRD PARTY PLAINTIFFS further seek such other and further relief to which they may show themselves entitled under both law and equity.

Respectfully submitted,

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Appendix J

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OF COUNSEL:

MIKE DRISCOLL
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APPENDIX K — ORDER FILED OCTOBER 10, 1990 — IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 90-2810

IN RE: WILLIAM P. CLEMENTS, JR., ET AL.,

Petitioners.

On Petition for Writ of Mandamus

Before JOLLY, HIGGINBOTHAM, and JONES, Circuit Judges.

BY THE COURT:

It appearing that all counsel now agree that the stay entered by this court on September 21, 1990 is no longer necessary, it is hereby VACATED, without prejudice.

Our decision to vacate the stay is premised on two points. First, we understand that the district court will not authorize release of felony offenders without sufficient notice for application by any party for further stay by this court.

Second, we understand that the parties are working to obtain a process that will protect the public safety and the integrity of the criminal justice system as well as the rights of prisoners. In this regard, it is significant that the state of Texas sees the *Ruiz* decree as a potential impediment to the flow of state prisoners from county facilities to its custody. We repeat: such superintending injunctions must (1) be tailored to the found wrong; and (2) impose limits upon state institutions no greater than is necessary to remedy found deprivations of constitutional rights; and (3) be modified to reflect changing conditions, including any

change in threats to the public safety as well as changes in the prison conditions that supported the extant decree. *See Ruiz v. Lynaugh,* 811 F.2d 856 (5th Cir. 1987) (Hill, J., specially concurring).

APPENDIX L — ADDITIONAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN *ALBERTI*

Texas Constitutional Provisions

Tex. Const. art. VIII, § 1-a (Vernon 1984):

> The several counties of the State are authorized to levy ad valorem taxes upon all property within their respective boundries for county purposes . . .

1. Tex. Penal Code Ann. § 12.31(a) (Vernon Supp. 1992)

> An individual adjudged guilty of a capital felony in a case in which the state seeks the death penalty shall be punished by confinement in the Institutional Division of the Texas Department of Criminal Justice for life or by death. An individual adjudged guilty of a capital felony in a case in which the state does not seek the death penalty shall be punished by confinement in the institutional division for life.

2. Tex. Penal Code Ann. § 12.32(a) (Vernon Supp. 1992)

> An individual adjudged guilty of a felony of the first degree shall be punished by confinement in the Texas Department of Corrections for life or for any term of not more than 99 years or less than 5 years.

3. Tex. Penal Code Ann. § 12.33(a) (Vernon 1974)

> An individual adjudged guilty of a felony of the second degree shall be punished by confinement

in the Texas Department of Corrections for any term of not more than 20 years or less than 2 years.

4. Tex. Penal Code Ann. § 12.34(a) (Vernon Supp. 1992)

> An individual adjudged guilty of a felony of the third degree shall be punished by: (1) confinement in the institutional division of the Texas Department of Criminal Justice for any term of not more than 10 years or less than 2 years; (2) confinement in a community correctional facility for any term of not more than 1 year.

5. Tex. Penal Code Ann. § 12.42 (Vernon 1974 & Supp. 1992)

> (a) If it be shown on the trial of a third-degree felony that the defendant has been once before convicted of any felony, on conviction he shall be punished for a second-degree felony.
>
> (b) If it be shown on the trial of a second-degree felony that the defendant has been once before convicted of any felony, on conviction he shall be punished for a first-degree felony.
>
> (c) If it be shown on the trial of a first-degree felony that the defendant has been once before convicted of any felony, on conviction he shall be punished by confinement in the Texas Department of Corrections for life, or for any term of not more than 99 years or less than 15 years . . .
>
> (d) If it be shown on the trial of any felony offense

that the defendant has been once before convicted of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction he shall be punished by confinement in the Texas Department of Corrections for life, or for any term of not more than 99 years or less than 25 years.

6. Tex. Crim. Proc. Code Ann. art. 42.09 §§ 1-4 (Vernon Supp. 1992)

§ 1. Except as provided in Sections 2 and 3, a defendant shall be delivered to jail or to the Department of Corrections when his sentence to imprisonment is announced, or his sentence to death is announced by the court . . .

§ 2. If a defendant appeals his conviction and is released on bail pending disposition of his appeal, when his conviction is affirmed, the clerk of the trial court on receipt of the mandate from the appellate court, shall issue a commitment against the defendant. The officer executing the commitment shall endorse thereon the date he takes the defendant into custody and the defendant's sentence begins to run from the date endorsed on the commitment. The Department of Corrections shall admit the defendant named in the commitment on the basis of the commitment.

§ 3. If a defendant is convicted of a felony and sentenced to death, life, or a term of more than ten years in the Department of Corrections and

> he gives notice of appeal, he shall be transferred to the Department of Corrections on a commitment pending a mandate from the court of appeals or the Court of Criminal Appeals.
>
> § 4. If a defendant is convicted of a felony and his sentence is a term of ten years or less and he gives notice of appeal, he shall be transferred to the Department of Corrections on a commitment pending a mandate from the court of appeals or the Court of Criminal Appeals upon request in open court or upon written request to the sentencing court. Upon a valid transfer to the Department of Corrections under this section, the defendant may not thereafter be released on bail pending his appeal.

7. Tex. Rev. Civ. Stat. Ann. art. 6166r (in effect from 1927 — August 31, 1989) (recodified at Tex. Gov. Code Ann. § 499.006 (Vernon 1990) (deleting "speedy") and recodified later at Tex. Gov. Code Ann. § 500.006 (Vernon Supp. 1992))

> The [Director of the Texas Department of Corrections] shall make suitable provision and regulation for the safe and speedy transportation of prisoners from counties where sentenced to the State penitentiary by the sheriffs of such respective counties if such sheriffs are willing to perform such services as cheaply as said commission can have it done otherwise. Said transportation shall be on State account . . .

8. Tex. Gov't Code Ann. § 493.001 (Vernon Supp. 1992)

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(formerly Tex. Rev. Civ. Stat. Ann. art. 4413(401) § 1.02(a))

> The [Texas Department of Criminal Justice] is the State agency with primary responsibility for: (1) the confinement, supervision, and rehabilitation of felons; (2) the development of a system of state and local punishment, supervision, and rehabilitation programs and facilities; and (3) the reintegration of felons into society after release from confinement.

9. Tex. Gov't Code Ann. § 495.001(a) (Vernon Supp. 1992) (formerly Tex. Gov't Code Ann. § 494.001(a) (Vernon 1990))

> The board [of Criminal Justice] may contract with a private vendor or with the commissioners court of a county for the financing, construction, operation, maintenance, or management of a secure correctional facility.

10. Tex. Gov't Code Ann. § 495.004 (Vernon Supp. 1992) (formerly Tex. Gov't Code Ann. § 494.004 (Vernon 1990))

> A private vendor or county operating under a contract authorized by this subchapter may not: (1) compute inmate release and parole eligibility dates; (2) award good conduct time; (3) approve an inmate for work, medical, or temporary furlough or for preparole transfer; or (4) classify an inmate or place an inmate in less restrictive custody than the custody ordered by the institutional division.

Supreme Court, U.S.
FILED
APR 20 1992
OFFICE OF THE CLERK

(7)

No. 91-1202

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM 1991

Ann Richards, Governor of Texas; Selden Hale, III, Mamie Moore Proctor, Hon. Clarence N. Stevenson, Allan B. Polunsky, James M. Eller, F. L. Stephens, Jerry H. Hodge, Joshua W. Allen, Sr., Ellen J. Halbert, Members, Texas Board of Criminal Justice; James A. Lynaugh, Executive Director, Texas Department of Criminal Justice,

Petitioners

v.

John Lindsay, Harris County Judge; Ei Franco Lee, Jim Fonteno, Steve Radack, Jerry Eversole, Harris County Commissioners; Johnny Klevenhagen, Harris County Sheriff,

Respondents

v.

Lawrence R. Alberti, Jimmy E. Collins, Henry C. Langer, Jose' J. Pina, II, Pat Reed, Wesley Sellers, individually and on behalf of all others similarly situated,

Respondents

On Petition for Certiorari
To the United States Court of Appeals
For the Fifth Circuit

PETITIONERS' REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION

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Attorney General of Texas

WILL PRYOR
First Assistant Attorney General

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REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION

A. AS TO MOOTNESS: MASSIVE BARRAGE OF FEDERAL JUDICIAL POWER AIMED AT EXPANDING STATE PRISON CAPACITY AT THE BACK-END OF THE TEXAS CRIMINAL JUSTICE SYSTEM WHILE HOLDING HARRIS COUNTY JAIL AT DESIGN CAPACITY IMPOSES ONGOING FINANCIAL LIABILITY FOR STATE TAXPAYERS AND ENSURES ONGOING CONTROVERSY.

The Plaintiff and County Respondents (hereinafter, sometimes "the Plaintiffs" and "the County") argue in their Briefs in Opposition (hereinafter, "Briefs") that there is no longer any controversy because legislation recently passed by the Texas legislature, H.B. 93,[1] has "clarified the relation of the duties and responsibilities of the state and the counties for housing prisoners." Plaintiffs' Brief at 3-5; *see also* County Brief at 15. For several reasons, nothing could be further from the truth.

First, neither the Fifth Circuit nor the district court in this case (hereinafter the "*Alberti* court") has even heeded the explicit language of H.B. 93 and the state court settlement agreements allowing compensation for transfers to other county jails *only on or after* October 1, 1991. *See* TEX. GOV'T CODE § 499.125 (Vernon Supp. 1992) App. A 5; *see also* App. B to this Reply at 4-5 (settlement agreement in *Harris County v. State of Texas*, No. 475,468 (Dist. Ct. of Travis Co., 126th Judicial District of Texas, pending)); Petition for Writ of Certiorari (hereinafter "Petition") at 10-11. Instead, State Defendants have deposited $6,750,000 into the registry of the *Alberti* court to compensate Harris County for transfers *prior* to October 1, 1991, and to date County Defendants have requested an additional $4,572,285.25 for such transfers.

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[1] TEX. GEN. & SPECIAL LAWS 1991, 2d Called Sess., Ch. 10, pp. 180-226, eff. August 29, 1991 (hereinafter, "H.B. 93"). See pertinent excerpts in Appendix (hereinafter "App.") A to this Reply.

Moreover, compensation for transfers prior to October 1, 1991 is especially inappropriate in light of the legislative history of H.B. 93 which shows that an earlier version of that law would have allowed compensation under state law from February 7, 1991, the date of the *Alberti* court's original order. S.B. 24 (introduced in the First Called Session) § 14.02, p. 34, proposing TEX. GOV'T CODE § 499.123(b) (copies of entire bill lodged with Clerk of the Court). The deletion of that provision indicates that the Legislature's intent was not to compensate Harris County prior to October 1, 1991. *Smith v. Baldwin*, 611 S.W.2d 611, 616-617 (Tex. 1980); *see also Bullock v. Calvert*, 480 S.W.2d 367, 370-372 (Tex. 1972) (lack of appropriations evidence of legislative intent); TEX. CONST. Art. VIII, § 6 (funds may not be drawn from the State treasury without a specific appropriation therefor). Hence, the propriety of what Harris County concedes to be federally ordered compensation[2] by the State of Texas to its political subdivision or "*the district court's reimbursements made to Harris County*," County Brief at 11, still remains a live controversy with state taxpayers seeking the return of their monies improperly awarded as compensation to Harris County by the lower court.

Second, the *Alberti* court has ordered the Harris County jail capped at its design capacity (4,698 inmates) based on state statutes and a 1975 consent decree even though these standards do not, according to the *Alberti* Special Master, necessarily establish a constitutional standard. *See* trial of week of September 12, 1989, tr. vol. I, pp. 162-165; Petition at 12. Moreover, both the *Alberti* Special Master and the state's expert gave testimony which established that the Harris County jail

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[2] This is not a case at all like *Benjamin v. Malcolm*, 803 F.2d 46 (2nd Cir. 1986), *cert. denied sub nom, Cuomo v. Koehler*, 480 U.S. 910 (1987) or *Tate v. Frey*, 735 F.2d 986 (6th Cir. 1984) as the County Respondents suggest. *See* County Brief at 14. Both *Benjamin* and *Tate* concerned *accepting inmates into existing units operated by the state, not compensating a state's political subdivision for the acquisition of additional capacity* as is the case here. The latter situation raises profound questions under Article III, the Eleventh Amendment and principles of federalism.

could be constitutionally managed at a range of 5,500-6,000, see Petition at 12-13, and the *Alberti* court routinely set caps at 6,300. Petition at 13.

Pursuant to the *Alberti* court's ruling, Petitioners must make transfers under H.B. 93 to other counties sufficient to reduce the population in the Harris County jail to the design capacity (4,698) as opposed to a level of 6,000 which the *Alberti* Special Master and the state's expert testified should be appropriate. The difference between those two population levels is 1,302. The current cost per day of a transfer under H.B. 93 is approximately $35 per day. *See* Contracts attached to Request for Ruling on Motion for Reconsideration and Vacation of Portions of the Orders of November 25, 1991 and December 3, 1991 and Request for Expedited Consideration in *Alberti v. Klevenhagen v. Richards*, Civil Action No. 72-H-1094 (S.D. Tex. Houston Div.) (copies lodged with Clerk of the Court). Under these figures State Defendants must bear a potential aggregate cost of *$45,570 per day* in order to comply with the district court's order setting the design capacity of the Harris County jail at its constitutional capacity. This amounts to an aggregate cost of *$16,643,050 per year.*[3] Hence, the district court's determination that design capacity is equal to constitutional capacity certainly is not moot and raises the prospect of profound fiscal consequences for the state.

Third, the *Alberti* court's intrusion into the Texas criminal justice system and state budgetary and legislative process shows little sign of abating. Given the ability of front-end population pressures in Harris County to "outstrip"[4]

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[3] Even assuming that the state would have to compensate Harris County at a rate of $20 per day under H.B. 93 ($26,040 per day, $9,504,600 per year) for the 1,302 inmates that remained in the jail, the extra costs (more than $7,000,000 per year) still would be substantial. Nor is it certain that payments to Harris County will be maintained in light of state budgetary constraints.

[4] *See* Report of December 13, 1991 by the *Alberti* Special Master on Harris County sentencing practices (hereinafter "Report of *Alberti* Special

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the state's ability to add additional capacity, except for a few isolated cells in remote counties, there are no more jail cells left to transfer inmates pursuant to H.B. 93. As a result, the *Alberti* court on March 13, 1992 entered an order (App. C to this Reply) requesting jail and prison population projections for the next six months, twelve months, two years and five years and the filing of a joint remedial plan. Given its prior remedial order and the Fifth Circuit's affirmance of that order, coupled with the explosive population pressure in Harris County (number of transfer-eligible felons sentenced to state prison sometimes increasing at rate of approximately 100 per week), there can be no doubt that the *Alberti* court will order either massive acquisition of new capacity or compensation to Harris County to acquire new capacity, if not wholesale release of felons,[5] absent some limiting ruling by this Court.

B. THE *ALBERTI* DECISION DOES CONFLICT WITH *KELLY*.

Both the Plaintiffs (Brief at 5-6) and the County (Brief at 12-14) contend the Fifth Circuit successfully distinguished *Kelly v. Metropolitan County Board of Education of Nashville and Davidson County, Tennessee v. State of Tennessee*, 836 F.2d 986 (6th Cir. 1987), *cert denied*, 487 U.S. 1206 (1988) from its decision in *Alberti*. They further assert -- erroneously -- that Petitioners did not address the Fifth Circuit's attempted distinction between the two cases.

The distinction the Fifth Circuit attempted to draw between *Kelly* and its own decision essentially was that in *Kelly*

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Master,") (copies lodged with the Clerk of the Court) at 24; *see also* Errata to Monitor's Review of Objections of March 11, 1992 (hereinafter "Monitor's Review") (copies lodged with the Clerk of the Court).

[5] The *Alberti* Special Master has recommended triggering the Prison Management Act (PMA), TEX. GOV'T CODE Ch. 444, Subch. B (Vernon Supp. 1992); App. A 1, to expedite the release of *felons* thereby easing population pressures in facilities housing *misdemeanants*. *See* Monitor's Review at 15, 19-20.

the state had not been adjudicated a *current* constitutional violator, whereas in *Alberti*, the State Defendants (Petitioners) had been. *Alberti v. Sheriff of Harris County v. Richards*, 937 F.2d 984, 1001 (5th Cir. 1991) (Petition at App. A 34-35). Petitioners did address this distinction at 14-15 and 17 of the Petition, arguing that the distinction begged the central and critical question decided in *Kelly* -- whether federal courts should inject themselves into internal *state-law* disputes between state governmental entities and adjudicate such issues as their division of financial responsibilities. *Kelly*'s core holding was that federal courts should refrain from deciding such disputes.[6] Petition at 15-17. Petitioners in this case were held "constitutional violators" only because the Fifth Circuit ignored *Kelly*'s core holding and proceeded to adjudicate a dispute concerning "*hard questions*" of "*exclusively*" state law, *Alberti*, 937 F.2d at 994 (Petition at App. A 18), between Petitioners and the County over which State agency had legal responsibility for the inmates in question. The Fifth Circuit thus failed to harmonize its decision to adjudicate the "*exclusively*" state-law dispute between state officials and the County[7] with the chief ground for decision in *Kelly* -- that federal courts should not even reach such controversies.

C. THE LOWER COURT SHOULD HAVE ABSTAINED OR, ALTERNATIVELY, CERTIFIED TO THE TEXAS SUPREME COURT.

It is almost impossible to overstate how weak the Respondents' arguments are in regards to abstention or, alternatively, certification. Plaintiffs did not even address these issues,

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[6] This is expecially so when neither the County nor Plaintiffs have argued that Petitioners' financial assistance was necessary to secure Plaintiffs' federally protected rights. Petition at 17-18.

[7] While the Plaintiffs did sue Petitioners, they did so only after the second trial on liability and at the suggestion of the *Alberti* court. Transcript, Trial of September 12-15, 1989, vol. 1, pp. 5-11, vol. 4(A), p. 83. Moreover, Plaintiffs recognized that state, not federal, court was the appropriate forum for the county to seek reimbursement. *See* Request for Emergency Order of October 28, 1990 at 4-5 (Copies lodged with Clerk of the Court).

a response which has the benefit of candor since in the Fifth Circuit they explicitly acknowledged the law was unsettled and moved the court for certification. See App. D to this Reply.

On the other hand, the County, without citation to precedent, advances the position that to impose a remedy against one defendant without determining the liability of all is "contrary to established principles of jurisprudence." County Brief at 17. Yet this is exactly what the Sixth Circuit has suggested must be done (at least as to third-party defendants) when it held that the "'constitutional wrongdoers must pay for their wrongs' argument has little or no force when we are talking about two political entities, a state and one of its subdivisions", and the legislature has chosen not to shift "to the state as a whole the costs of repairing the wrongs within each subdivision." *Kelly*, 836 F.2d at 998; Petition at 15-16. And the Sixth Circuit's reasoning applies *a fortiori* here, where "[t]he county clearly has some responsibility for the conditions in its own jails," but where Petitioners' liability rested on "*hard questions*" of "*exclusively*" state law. *Alberti*, 937 F.2d at 994 (Petition at App. A 18). Under the Eleventh Amendment, especially when state law is unclear,[8] "it is difficult to think of a greater intru-

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[8] The County Respondents continue to rely on a single state district court's letters, findings and judgments as clearly establishing the state law in this case. *See* County Brief at App. A-H. However, they neglect to note that the judgments underlying both state court cases have been vacated, App. E and F to this Reply, pursuant to settlement (App. B). Accordingly, the material in these appendices are of no legal effect.

The County Respondents' reliance on *Houston v. Hill*, 482 U.S. 451 (1987), Brief at 15 n.36, is misplaced. In *Hill* the municipal courts had for 30 years "regularly applied" and construed "an unambiguous statute" that facially violated the First Amendment. *Hill*. at 470. Here, there are unsettled issues of state law involving recently enacted statutes which implicate critical issues of statewide concern. In such circumstances, federal courts should await a truly authoritative ruling from Texas' highest court.

Nor can *Tarrant County Commissioners Court v. Markham*, 779 S.W.2d 872, 874-75 (Tex. App. - Fort Worth 1989, writ denied), County's Brief at 9 n.21, be considered authoritative. The observations the County quotes were gratuitous *dicta* made when Petitioners were not parties to the case and had no opportunity to present their side of the story.

sion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 106 (1984).[9] Certainly, at the very lest, the Fifth Circuit should have certifed to the Texas Supreme Court. Petition at 23.

D. THE DELIBERATE INDIFFERENCE ISSUE IS RIPE FOR REVIEW.

Neither the County nor Plaintiffs have objected to Petitioners' Motion to Defer Proceedings on Petition for Writ of Certiorari Pending Decision in *Alberti v. Klevenhagen*, Fifth Cir. Nos. 91-2946, 91-6062, 92-6206. Oral argument for these appeals has been set the week of July 6, 1992, App. G to this Reply, and the Fifth Circuit has expedited the proceeding. App. H to this Reply. Accordingly, this Court may simply defer proceedings on this petition and await further rulings in the Fifth Circuit.

However, this issue is ripe for review now inasmuch as the Fifth Circuit should have concluded that Petitioners were not deliberately indifferent *as a matter of law*, without the necessity of any remand for fact-finding. In light of the uncertainty in state law, state officials cannot be held deliberately indifferent *as a matter of law*, because their duties under state law were not "clearly established" or readily "apparent." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Anderson v. Creighton* 483 U.S. 635, 640 (1987); *see also Wilson v. Seiter* 501 U.S. __, 111 S.Ct. at 2323, 2326-27 (relying on individual liability cases in formulating "deliberate indifference" standard).[10] In this re-

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[9] Given *Pennhurst*, the County cannot reasonably stand on *Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U.S. 183 (1941) or other circuit authority cited in their Brief at 16 n.40. Such diversity cases, involving private parties, do not raise Eleventh Amendment concerns.

[10] The County also argues that State Defendants should have moved to modify *Ruiz*. County Brief at 21. Petitioners have already addressed that issue. Petition at 25. Certainly whether modification would have been granted is not clearly established. Moreover, Petitioners moved on

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gard, it is clear in the Fifth Circuit that, in the absence of *clearly established* direct supervisory responsibility over local jails, even a State-law duty to inspect the jails coupled with an obligation to promulgate standards for them is insufficient to confer a duty on a State agency (the Texas Commission on Jail Standards) to remedy unconstitutional conditions found in them. *Bush v. Viterna*, 795 F.2d 1203 (5th Cir. 1986); *see also Rizzo v. Goode*, 423 U.S. 362, 375-76 (1976). This is so despite the fact that the Jail Standards Commission had the power under Texas law to transfer inmates from a jail that is not "safe and suitable." TEX. GOV'T CODE § 511.012(b) (Vernon 1990). Here, in contrast, State Defendants had no state law means to inspect local jails (let alone a duty to do so) and no duty to promulgate standards.[11] In light of *Bush*, it simply was not clearly

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January 29, 1991 to terminate jurisdiction in *Ruiz* pursuant to *Board of Education of Oklahoma City v. Dowell*, 498 U.S. ___, 111 S.Ct. 630 (1991). *See also Freeman v. Pitts*, ___ U.S. ___, S.Ct. No. 89-1290 (March 31, 1992). A hearing on that motion is set for July 6, 1992.

[11] If Petitioners had owed some clearly defined duty to remedy unconstitutional conditions in the local jail, it might be argued that the November 8, 1988 order, alluded to by County Respondents (Brief at 20), constituted notice and placed an obligation on Petitioners to inspect the jail. Here, however, Petitioners had no duty under Texas law to inspect the jail, nor even the means to conduct an inspection, let alone a clear duty to remedy the conditions there. At the time of the November 1988 order, none of State Defendants' agents had a right even to enter the jail. Indeed, this is true even to this day at least as to inspecting the jail.

Furthermore, Petitioners were not a party to this suit in November of 1988, and, accordingly, the *Alberti* court's order of that date did not bind them to any legal or factual assertion it made. *Martin v. Wilks*, 490 U.S. 755, esp. at 763 (1989). Indeed, Petitioners still maintain that both the legal and factual assertions contained in that order are clearly wrong. (For example, at the time of that order, which alleged overcrowded conditions in the jail, the jail's population was reportedly approaching 6,000 [5,650 in July 1988, according to the November 8, 1988 order]. However, both the *Alberti* Special Master and the state's expert testified that the jail can be constitutionally managed at this population level. See Petition at 12-13; *see also* Petition at 27-29. And the *Alberti* court routinely capped the jail at 6,300. Petition at 13.)

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established that a State agency (such as TDCJ) with no state law authority to supervise local jails would be liable for remedying unconstitutional conditions in one. Indeed, such a contention would have had (and has) at least the appearance of anomaly.[12] This is especially the case when, in contrast to the Texas Commission on Jail Standards, TDCJ had no statutory involvement in transferring inmates to other county jails prior to H.B. 93.

E. PETITIONERS HAVE STANDING TO RAISE THE ISSUE OF THE *ALBERTI* COURT'S EQUATING DESIGN CAPACITY WITH CONSTITUTIONAL CAPACITY AND EXPLICITLY RAISED THE ISSUE, INCLUDING THE "WAIT AND SEE" APPROACH, IN THE COURT BELOW.

County Respondents claim, *without citation*, that Petitioners lack standing to challenge the cap on the jail. County Brief in Opposition at 21. Petitioners have, however, already shown their standing in their Petition at 27 n.28.

Both the County (Brief at 22) and Plaintiffs (Brief at 7-10) claim that Petitioner did not raise the "wait and see" challenge to caps in the Court below. The record, however, shows this assertion to be flatly wrong. See Brief of State Appellants in Fifth Circuit at 85-87 (App. I to this Reply, the entire section of Petitioners' brief to the Fifth Circuit relating to the con-

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Moreover, knowledge of the assertions in court orders or parties' pleadings, cannot serve as a surrogate for *actual knowledge* of the conditions of confinement and a clear state law duty to remedy those conditions arising from direct supervisory control over the jail. *See Rizzo v. Goode*, 423 U.S. at 375-76; *Bush v. Viterna*, *supra*.

[12] Moreover, *Bush*, decided after *Pennhurst* and dealing with Texas State structures, is far more persuasive authority than *Stewart v. Winter*, 669 F.2d 328 (5th Cir. 1982). The Mississippi officials said to be responsible in *Stewart* for convicted felons in local jails did have a degree of supervisory authority over those jails. *See e.g.* Miss. Code §§ 47-5-112(1), 47-5-10, 47-5-159 (Supp. 1981).

stitutional capacity of the jail, esp. at App I 2). Moreover, the County also briefed thoroughly the equation of constitutional capacity with design capacity. App. J attached hereto. In short, two parties aligned on this issue raised and thoroughly briefed it for review by the Fifth Circuit, which decided it. *Alberti*, 937 F.2d at 1000-1001 (Petition at App. A 33). There can be no question, then, that the issue is properly before this Court.

CONCLUSION[13]

For these reasons, Petitioners request that the Court grant them the relief sought in their Petition for a Writ of Certiorari and for such other relief as this Court may deem just, fair and equitable.

Respectfully submitted,

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[13] Petitioners are disturbed by County Respondents' attempts to portray Petitioners as misrepresenting the facts or law in this case. Deviations from the County's positions are not misrepresentations. Suffice it to say that Petitioners disagree with the County's characterizations.

APPENDIX A

PERTINENT STATUTORY CHANGES ENACTED BY H. B. 93

TEXAS GOVERNMENT CODE CHAPTER 499

SUBCHAPTER B. POPULATION MANAGEMENT

§ 499.025. Award of Administrative Good Conduct Time; Advancement of Parole Eligibility Date.[1]

* * * *

(b) * * * * If the Commission on Jail Standards determines that in any county jail in this state there exists an inmate awaiting transfer to the institutional division following conviction of a felony or revocation of probation, parole, or release on mandatory supervision and for whom all paperwork and processing required for transfer have been completed for not less than 45 days, the board[2] may direct the Board of Pardons and Paroles to proceed in the manner described by Subsection (c).

(c) If the Board of Pardons and Paroles receives a directive from the board under Subsection (b), the Board of Pardons and Paroles, acting in parole panels, shall immediately begin to review and consider for early release to intensive supervision parole each eligible inmate who would not at the time of review otherwise be eligible for parole. The board may impose additional criteria for determining which inmates are eligible for release under this subsection. A parole panel may not release an inmate under this subsection if the panel determines that the release of the inmate will increase the likelihood of harm to the public, according to objective parole criteria.

[1 The language set forth here under Subsection (b) is entirely new language enacted by H.B. 93. A version of Subsection (c) existed in previous law but was amended by H.B. 93.]

[2 The "board" refers to the Texas Board of Criminal Justice.]

* * * *

SUBCHAPTER F. PROCEDURES FOR REDUCING COUNTY JAIL BACKLOG[3]

§ 499.121. Legislative Declaration; Mandamus

(a) The legislature declares that until September 1, 1995, the institutional division shall continue to perform its duty to accept inmates only as provided by the allocation formula established under Section 499.071.[4]

(b) The legislature declares that until September 1, 1995, a county shall continue to perform its duty to confine and maintain under suitable conditions and at the county's own expense each inmate eligible for transfer from the county to the institutional division, until the date the inmate is actually accepted into custody by the institutional division. This subsection does not take effect if the County of Nueces et al. v. Texas Board of Corrections, et al., in the 250th Judicial District Court of Travis County, Texas, Cause No. 452,071 and Harris County, Texas v. the State of Texas, et al., in the 126th District Court of Travis County, Texas, Cause No. 475,468 are settled by written agreement on or before the 31st day after the effective date of this article.

(c) The legislature declares that on and after September 1, 1995, the institutional division has a duty to accept, not later than the 45th day after the date on which all processing required for transfer has been completed, each inmate confined in a county jail while under an order of commitment to the institutional division.

[3 All the provisions set forth below were newly enacted by H.B. 93.]

[4 This refers to Section 499.071 of the Texas Government Code, which is set forth in App. Z to the Petition.]

(d) The duties provided by this subchapter may be enforced by an action in mandamus.

§ 499.122. Inmate Count

The Commission on Jail Standards shall analyze monthly the population of each jail in this state that is the jail for a qualifying county and determine the number of inmates confined in the jail who are awaiting transfer to the institutional division following conviction of a felony or revocation of probation, parole, or release on mandatory supervision and for whom all paperwork and processing required under Section 8(a), Article 42.09, Code of Criminal Procedure, for transfer have been completed. The commission may not consider in determinng the population of the jail under this section any inmate who is in the jail after having been transferred from another jail and for whom the commission has made payment under this subchapter.

§ 499.123. Payment

(a) Not later than the 32nd day after the effective date of this subchapter, the Commission on Jail Standards shall determine for each jail in this state that is the jail for a qualifying county the number of inmates confined in the jail on April 1, 1991, who were awaiting transfer to the institutional division following conviction of a felony or revocation of probation, parole, or release on mandatory supervision and for whom paperwork and processing required under Section 8(a), Article 42.09, Code of Criminal Procedure, for transfer had been completed on that date.

(b) A qualifying county is entitled to payment from the Commission on Jail Standards as compensation to the county for confining the number of inmates determined as ready for transfer under Subsection (a) at an amount per inmate to be determined by dividing into $11.5 million the total number of inmates in jails that are the jails for qualifying counties under

Subsection (a) confined by qualifying counties. The commission shall make the payment under this subsection on or before January 15, 1992.

(c) Not later than September 10, 1993, the Commission on Jail Standards shall determine for each in this state that is the jail for a qualifying county the number of inmates confined in the jail on September 1, 1993, who were awaiting transfer to the institutional division following conviction of a felony or revocation of probation, parole, or release on mandatory supervision and for whom paperwork and processing required under Section 8(a), Article 42.09, Code of Criminal Procedure, for transfer had been completed, as determined under Section 499.122, on that date.

(d) A qualifying county is entitled to payment from the Commission on Jail Standards as compensation to the county for confining the number of inmates determined as ready for transfer under Subsection (c) at an amount per inmate to be determined by dividing the total number of inmates in county jails that are the jails for qualifying counties under Subsection (c) confined by qualifying counties into $11.5 million. The commission shall make the payment under this subsection or or before January 15, 1994.

§ 499.124. Emergency Overcrowding Relief

(a) From the effective date of this subchapter until August 31, 1993, for each month in which the number of inmates confined in a jail that is the jail for a qualifying county who are awaiting transfer to the institutional division following conviction of a felony or revocation of probation, parole, or release on mandatory supervision and for whom paperwork and processing required under Section 8(a), Article 42.09, Code of Criminal Procedure, for transfer have been completed, as determined under Section 499.122, is greater than 50 percent of the number of such inmates confined in the jail on April 1, 1991, as determined under Section 499.123, the Commission on Jail

Standards shall pay to a qualifying county for each inmate in excess of 50 percent but less than or equal to 210 percent of the April 1, 1991, number for each day of confinement the sum of $20, and for each inmate in excess of 210 percent of the April 1, 1991, number for each day of confinement the sum of $30.

(b) From September 1, 1993, until September 1, 1995, for each month in which the number of inmates confined in a jail that is the jail for a qualifying county who are awaiting transfer to the institutional division following conviction of a felony or revocation of probation, parole, or release on mandatory supervision and for whom paperwork and processing required under Section 8(a), Article 42.09, Code of Criminal Procedure, for transfer have been completed, as determined under Section 499.122, is greater than 25 percent of the number of such inmates confined in the jail on April 1, 1991, as determined under Section 499.123, the Commission on Jail Standards shall pay to a qualifying county for each inmate in excess of 25 percent but less than or equal to 210 percent of the April 1, 1991, number for each day of confinement the sum of $20, and for each inmate in excess of 210 percent of the April 1, 1991, number for each day of confinement the sum of $30.

§ 499.125. Transfer of Felony Backlog

(a) If a state or federal court determines that conditions in a county jail are unconstitutional, and if on or after October 1, 1991, the percentage of inmates in the jail awaiting transfer to the institutional division is 20 percent or more of the total number of inmates in the jail, the commission shall transfer inmates from the jail to an appropriate jail, detention center, work camp, or correctional facility, but only to the extent necessary to bring the county into compliance with court orders or to reduce the percentage of inmates in the jail awaiting transfer to the institutional division to less than 20 percent of the total number of inmates in the jail.

(b) The Commission on Jail Standards is liable to counties for payment of the costs of transportation for and maintenance of transferred inmates. Costs paid to a county shall be paid into the treasury of the county operating the facility receiving the inmates. The costs for maintenance of an inmate for which the commission is liable under this section are:

> (1) the actual costs, as determined by the agreement between the board and the officer or governing body authorized by law to enter into contracts, but only if Harris County, Texas v. the State of Texas, et al., in the 126th District Court of Travis County, Texas, Cause No. 475,468 is settled by written agreement on or before the 31st day after the effective date of this subchapter; or
>
> (2) if the suit described by Subdivision (1) of this subsection is not settled within the period specified by the subdivision, for each inmate for each day the first $20 of actual costs and one-half of costs that are in excess of $20, with the transferring county liable to the operators of the receiving facility for all costs are [sic] not paid by the state.

(c) If the board determines that a county is not reasonably utilizing its available certified jail beds, the payments authorized by this section shall be withheld to the extent necessary to equal the cost of the unutilized beds.

§ 499.126. Definition

(a) In this subchapter, "qualifying county" means a county that:

(1) on or after the effective date of this subchapter does not initiate or become a party to a suit against the state or a

state agency or state official, the subject of which is the reimbursement of the county for the confinement of inmates in the county jail who are awaiting transfer to the institutional division following conviction of a felony or revocation of probation, parole, or release on mandatory supervision; and

(2) if, before the effective date of this subchapter, it was a party to a suit in state court described by Subdivision (1), has before the 31st day after the effective date of this subchapter:

(A) had the county's suit vacated and dismissed by the court;

(B) had the county's suit abated by the court, by entry of an abatement order that specifically provides that:

(i) the suit may not be reactivated except before September 1, 1997, and except on a finding by the court that the state has substantially failed to perform a duty imposed under this subchapter;

(ii) the county is barred from any claim for reimbursement for the cost of confining inmates on and after the effective date of this subchapter and until September 1, 1995, other than reimbursement specified in this subchapter; and

(iii) if the suit is not reactivated before September 1, 1997, the court shall vacate and dismiss the suit on that date; or

(C) had the county's suit settled by written agreement.

(b) For the purposes of this section, a court retains jurisdiction over a case in which the court has entered an abatement order during the period in which the case is abated.

APPENDIX B

SETTLEMENT AGREEMENT IN HARRIS COUNTY, ET AL. V. THE STATE OF THE STATE OF TEXAS, ET AL., NO. 475,468 IN THE 126TH DISTRICT OF TRAVIS COUNTY, TEXAS

AGREEMENT

WHEREAS, overcrowding in the Institutional Division of the Texas Department of Criminal Justice, and its predecessor, the Texas Department of Corrections (hereinafter collectively referred to as the "Institutional Division") has contributed to the cost to the Plaintiff/Relator Harris County and the Intervenor Montgomery County (hereinafter sometimes referred to as the "Counties") of confining persons who have received a judgment and sentence ordering confinement in the Texas Department of Criminal Justice following conviction of a felony, revocation of probation, parole, or release on mandatory supervision for whom paperwork and processing required for transfer has been completed (hereinafter "state-sentenced inmates") prior to their transfer to the Institutional Division; and

WHEREAS, in the future Harris County and Montgomery County are likely to continue incurring the cost of confining state sentenced inmates prior to their transfer to the Institutional Division; and

WHEREAS, House Bill 93 of the Seventy-Second Legislature in the Second Called Session (hereinafter "H.B. 93") has been offered as a mechanism whereby the reformation of the criminal justice system can begin to take place while, in the meantime, providing partial compensation to Harris County and Montgomery County for confining state-sentenced inmates prior to their transfer to the Institutional Division; and

WHEREAS, the parties desire to settle and compromise the judgment obtained by Harris County and Montgomery

County against the Respondents in Harris County v. State of Texas, et al, cause number 475,468 in the 126th Judicial District Court of Travis County, Texas (hereinafter the "suit"); and

WHEREAS, the parties desire to reach an agreement in the suit which would be enforceable in the courts, but would not, unfairly, limit the ability of the State of Texas to operate and/or reform the criminal justice system;

NOW, THEREFORE, in order to induce Harris County and Montgomery County to settle and compromise the judgment obtained by Harris County and Montgomery County in the suit, the Respondents hereby agree to:

1. Not later than the 32nd day after the effective date of Article 11 of H.B. 93 or the signing of this Agreement, whichever is later, the Texas Commission on Jail Standards (hereinafter the "TCJS") shall determine for the county jails of Harris County and Montgomery County, the number of inmates confined in the jail and confined in another county jail at a cost to the County on April 1, 1991, who were awaiting transfer to the Institutional Division following conviction of a felony, revocation of probation, parole or release on mandatory supervision, and for whom paperwork and processing required for transfer had been completed on that date. Harris County and Montgomery County are entitled to payment from the TCJS as compensation to the Counties for confining the number of inmates determined as ready for transfer under Section 499.123 of the Government Code, as amended by H.B. 93, at an amount per inmate to be determined by dividing into $11.5 million the total number of inmates as determined by the provisions of Section 499.123 (b) of the Government Code, as amended by H.B. 93.

In the event Harris County or Montgomery County has not made a record of the date the transfer paperwork required by Article 42.09 of the Code of Criminal Procedure was completed, they may use the date the judgment and sentence

was signed by a Judge. However, for purposes of payment under other provisions of the Agreement, Harris County and Montgomery County agree and are required to maintain a permanent record of the date the paperwork provided for by Article 42.09 of the Code of Criminal Procedure was completed and the inmate became eligible for transfer to the Institutional Division.

The TCJS shall make the payment under this subsection on or before January 15, 1992.

2. Not later than September 10, 1993, the TCJS shall determine for the county jails of Harris County and Montgomery County, the number of inmates confined in the jails on September 1, 1993, who were awaiting transfer to the Institutional Division following conviction of a felony, or revocation of probation, parole or release on mandatory supervision, and for whom paperwork and processing required for transfer had been completed on that date. Harris County and Montgomery County are entitled to payment from the TCJS as compensation to the Counties for confining the number of inmates determined as ready for transfer under this section at an amount per inmate to be determined by dividing into $11.5 million the total number of inmates as determined by the provisions of Section 499.123(d) of the Government Code, as amended by H.B. 93.

The TCJS shall make the payment under this subsection on or before January 15, 1994.

3. From the effective date of H.B. 93 until August 31, 1993, for each month in which the number of inmates confined in the Harris County or Montgomery County jail and confined in another county jail at a cost to Harris County or Montgomery County awaiting transfer to the Institutional Division following conviction of a felony, revocation of probation, parole or release on mandatory supervision for whom paperwork and processing required for transfer has been completed, as determined under Section 499.122 of the Government Code, as

amended by H.B. 93, is greater than 50 percent of the number of such inmates confined in the jail on April 1, 1991, as determined under Section 499.123 of the Government Code, as amended by H.B. 93, the TCJS shall pay to Harris County or Montgomery County for each inmate in excess of 50 percent but less than or equal to 210 percent of the April 1, 1991, number for each day of confinement the sum of $20, and for each inmates in excess of 210 percent of the April 1, 1991, number, for each day of confinement the sum of $30.

4. From September 1, 1993, until September 1, 1995, for each month in which the number of inmates confined in the Harris County or Montgomery County jail and confined in another county jail at a cost to Harris County or Montgomery County awaiting transfer to the Institutional Division following conviction of a felony, revocation of probation, parole or release on mandatory supervision for whom paperwork and processing required for transfer has been completed, as determined under Section 499.122 of the Government Code, as amended by H.B. 93, is greater than 25 percent of the number of such inmates confined in the jail on April 1, 1991, as determined under Section 499.123 of the Government Code, as amended by H.B. 93, the TCJS shall pay to Harris County or Montgomery County for each inmate in excess of 25 percent but less than or equal to 210 percent of the April 1, 1991, number for each day of confinement the sum of $20, and for each inmate in excess of 210 percent of the April 1, 1991, number, for each day of confinement the sum of $30.

5. If a state or federal court determines that conditions in the Harris County or Montgomery County jail are unconstitutional, and if on or after October 1, 1991, the percentage of inmates in the jail awaiting transfer to the Institutional Division is 20 percent or more of the total number of inmates in the jail, the TCJS shall transfer inmates from the jail to an appropriate jail, detention center, work camp, or correctional facility, but only to the extent necessary to bring Harris County or Montgomery County into compliance with court orders or to

reduce the percentage of inmates in the jail awaiting transfer to the Institutional Division to less than 20 percent of the total number of inmates in the jail. The TCJS is liable to the Counties for payment of the costs of transportation for and maintenance of transferred inmates. The costs for maintenance of an inmate for which the TCJS is liable under this section are the actual costs, as determined by the agreement between the Texas Board of Criminal Justice (hereinafter the "TBCJ") and the officer or governing body authorized by law to enter into contracts. No payments will be withheld unless the TBCJ determines that Harris County or Montgomery County is not reasonably utilizing its available certified jail beds, and then only to the extent necessary to equal the cost of unutilized beds.

6. Payments made to Harris County and Montgomery County pursuant to the provision of paragraphs one and three shall be made by the TCJS from a special fund of at least $56,982,500 appropriated for that purpose for all counties of the State in the 1992-93 legislative biennium.

7. Payments made to Harris County or Montgomery County pursuant to the provision of paragraphs two and four shall be made by the TCJS from a special fund of at least $56,982,500 appropriated for that purpose for all counties of the State in the 1994-95 legislative biennium.

8. Nothing in this Agreement shall be construed to limit the Legislature's ability or responsibility to appropriate additional amounts for purposes of payments provided for in H.B. 93 or to limit the Counties' ability to enforce the provisions of H.B. 93 in a proceeding outside this suit.

9. Respondents agree to begin planning and construction of thirteen thousand three hundred (13,300) additional prison beds in the legislative biennium of 1992-93 with funds appropriated for that purpose by the Legislature. Respondents further agree (i) to begin construction of an additional twelve thousand (12,000) drug treatment beds in the 1992-93 biennium or (ii) to

begin construction of at least an additional three thousand (3,000) drug treatment beds in the 1992-1993 legislative biennium and to begin construction of at least nine thousand (9,000) additional prison beds in the TDCJ system during the 1994-1995 legislative biennium. This obligation will be in addition to the obligation of the Respondents to complete construction and begin operation, in the legislative biennium of 1992-93, of the fifteen thousand (15,000) prison beds, for which funds have already been appropriated or obtained. The obligation to begin planning and constructing of the additional twenty-five thousand three hundred (25,300) prison and/or drug treatment beds during the 1992-93 biennium is contingent on the approval of the voters of S.J.R. No. 4, 72nd Legislature, 1st Called Session. However, no other provisions of this agreement, including, but not limited to, the provisions in paragraph 11, shall be contingent on the approval of the voters of S.J.R. No. 4, 72nd Legislature, 1st Called Session.

10. Respondents and the Counties agree that both parties have important roles and responsibilities in the efficient operation of the criminal justice system. Respondents acknowledge that the Institutional Division has the responsibility to accept state-sentenced inmates within a reasonable time once their paperwork and processing required for transfer has been completed. This Agreement reflects an effort by both Respondents and the Counties to provide a framework within which the backlog of state-sentenced inmates in county jails can be cooperatively and successfully addressed over the term of this Agreement. Respondents and the Counties agree that it is their mutual objective to achieve a criminal justice system in which state sentenced inmates are admitted to the Institutional Division within a period less than 45 days after they are ready for transfer. In furtherance of that objective, this Agreement shall terminate prior to September 1, 1999, if Respondents accept state-sentenced inmates, on an average over one year, not later than the 15th day after the date on which all processing required for transfer has been completed. Respondents and the Counties agree that nothing in this

Agreement shall be construed as an acknowledgement, admission or acceptance by the Respondents of an obligation, duty or requirement to accept sooner than the 45th day after the date on which all processing required for transfer has been completed for an inmate confined in a county jail while under an order of commitment to the Institutional Division and that this paragraph is not intended to be an admission of liability in this suit, or in any other suit, and shall be of no effect in any further legal proceedings between Respondents and the Counties, or any other entity.

11. Respondents agree that on and after September 1, 1995, the Institutional Division will accept, not later than the 45th day after the date on which all processing required for transfer has been completed, each inmate confined in a county jail while under an order of commitment to the Institutional Division.

12. Nothing in this Agreement shall be construed as an acknowledgement, admission, or acceptance by Harris County or Montgomery County of the reasonableness of a 45 day period prior to transfer of state-sentenced inmates to the Institutional Division. Nothing in this Agreement shall be construed as an acknowledgement, admission or acceptance by Harris County or Montgomery County of the reasonableness or constitutionality of the policy or practice of limiting the number of state-sentenced inmates being transferred to the Institutional Division to the number prescribed by the allocation formula.

13. Nothing in this Agreement shall be construed so as to require or obligate Respondents to increase the operational capacity of the Institutional Division as provided in paragraph 9 if Respondents can demonstrate that it is not necessary to increase operational capacity in order to, after September 1, 1995, accept, not later than the 45th day after the date on which all processing required for transfer has been completed, each inmate confined in a county jail while under an order of commitment to the Institutional Division.

14. The parties agree to execute the Agreed Motion to Vacate Judgment, Agreed Order Vacating Judgment, and Judgment attached hereto as Exhibits A, B, and C.

15. The parties agree to file the Agreed Motion to Vacate Judgment and Agreed Order Vacating Judgment attached as Exhibits A and B in the 126th Judicial District Court of Travis County, Texas.

The parties agree that the 126th Judicial District Court of Travis County, Texas, (hereinafter the "trial court") in this matter shall have continuing jurisdiction to determine whether the parties have complied with the provisions of this settlement Agreement.

In the event of the Respondents' nonperformance, Harris County and/or Montgomery County may move for reinstatement of the vacated judgment. If the trial court determines that the Respondents have violated the terms of this Agreement, the judgment will be reinstated and judgment will be entered for Harris County and/or Montgomery County. The amount due under the judgment will include the amounts due Harris County and/or Montgomery County as of April 30, 1991, as stated in the judgment, and the amounts due the Counties for confining state-sentenced inmates between May 1, 1991, and the date the judgment is reinstated, plus interest at the rate of ten percent (10%). The formula provided in the judgment for determining the amount of compensation due the Counties will be used in determining the amount due for the period from April 30, 1991, until the date the judgment is reinstated. Respondents will be entitled to an offset against the judgment amount for the amounts paid under this Agreement prior to the reinstatement of the judgment. The Respondents reserve their right to appeal the judgment if it is reinstated.

16. The parties agree that if the trial court determines that the Respondents have violated the terms of this Agreement, and the trial court determines that it is unable to reinstate the judg-

ment as provided for in paragraph 15, the parties agree that the new Judgment, attached hereto as Exhibit C, will be presented to the trial court for entry. Respondents will be entitled to an offset against the Judgment for the amounts paid under this Agreement prior to the entry of the Judgment. The Respondents reserve their right to appeal the Judgment after it is entered.

17. If the vacated judgment is reinstated or the new Judgment is entered, Respondent's obligations pursuant to this Agreement are terminated.

18. It is agreed that the penalty for non compliance with the Agreement by Respondents is reinstatement of the judgment rather than specific performance of paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 11 of this Agreement or contempt sanctions. It is agreed that paragraphs 14, 15, 16, 17, 18, 19, 20, and 21 of the Agreement may be enforced by an action for specific performance.

19. It is agreed that the signing of this Agreement constitutes a written agreement that settles the suit as required by Sections 499.121 and 499.126 of the Government Code, as amended by H.B. 93.

20. It is agreed that this Agreement is contingent on the Court of Appeals remanding the suit to the trial court for further proceedings, if necessary, and the trial court entering the Agreed Order Vacating Judgment attached hereto as Exhibit B.

21. This Agreement shall terminate September 1, 1999, unless a motion to reinstate the judgment has been filed or the judgment has been reinstated pursuant to the provisions in paragraph 15 above or the Judgment has been entered pursuant to the provisions in paragraph 16, in which case it terminates on reinstatement of the vacated judgment or entry of the new Judgment. It is further agreed by all parties herein that upon termination of the Agreement, other than by reinstatement of the vacated judgment or entry of the new judgment, Harris

County and Montgomery County will file a motion to dismiss with prejudice in the trial court.

22. The negotiation of the terms of this document shall not be admissible as evidence to prove intent of the parties or for any other purpose in any proceeding. This shall include but not be limited to previous drafts of this agreement, letters between the parties, oral statements by the parties in the negotiation of this document or any other communication between the parties.

The attorneys of record for the parties have hereunto signed their names with full power to bind their respective clients to this Agreement.

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APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, *et al.*	§	
V.	§	C.A. No. 72-H-1094
THE SHERIFF OF HARRIS COUNTY, TEXAS, *et al.*,	§	

ORDER

The Court having reviewed the Monitor's report filed December 13, 1991, the objections to that report, and the Monitor's review of those objections, it is hereby

ORDERED

as follows:

(1) The parties shall file with the Court on or before May 29, 1992 a *joint* population projection for the Harris County Jail facilities and for the Texas Department of Criminal Justice covering the following time periods: the next six months, twelve months, two years and five years; and

(2) The parties shall file with the Court or or before May 29, 1992 a *joint* proposed remedial plan addressing the overcrowding problem in the Harris County Jail facilities; and

(3) The issue of the constitutional capacity of the 701 Building is REFERRED to the Monitor for an evidentiary hearing and for findings and a recommendation to be submitted to the Court on or before May 29, 1992.

Because of the gravity of the overcrowding problem in Harris County and the rapid rate at which it is currently escalating, the Court finds that prompt attention is necessary and that the County and State defendants should give this matter immediate priority. Consequently, the Court will not entertain motions from the parties to extend the deadlines set forth in this order.

SIGNED at Houston, Texas, this 12th day of March, 1992.

/s/
Chief Judge James DeAnda
United States District Judge

APPENDIX D

EXCERPTS FROM PLAINTIFFS'-APPELLEES' BRIEF (pp. 65-72) IN *ALBERTI, ET AL. v. THE SHERIFF OF HARRIS COUNTY, ET AL., v. ANN RICHARDS, THE GOVERNOR OF TEXAS, ET AL.*, FIFTH CIR. NOS. 91-2274, 91-2210, 90-6034, 90-2441

h. Certification To Texas Supreme Court

If Judge Hart's rulings are not entitled to preclusive effect until they are set aside on appeal, then the proper procedure for this court to follow to respect the state's interest in obtaining state court resolution of state law issues while vindicating plaintiffs' constitutional rights and the authority of federal courts to redress constitutional deprivations, would be for this court to certify to the Texas Supreme Court any unresolved questions of Texas law. Plaintiffs further submit that the court should certify certain state law questions to the Texas Supreme Court for the additional reason that, as a practical matter, no final resolution of this protracted litigation can ultimately be achieved until those issues are decided by the Texas courts. Certification presents the greatest promise for the quickest definitive resolution of these issues, thereby speeding considerably the day on which this tortuous litigation can finally come to an end.

At this point, three things are indisputably clear: (1) the Harris County jails are massively, unconstitutionally overcrowded; (2) there are sufficient cells available in other county jails throughout the state to alleviate the problem (at least for the time being); and (3) the only question is whether, and to what extent, state officials should be required to participate in paying for that temporary remedy (utilization of vacant cells in other counties) or otherwise assisting in the abatement of ongoing constitutional violations in the jails.

This case has been pending for over eighteen years. Yet, nobody disputes the fact that the mandates of the consent decree entered more than sixteen years ago still have not been achieved. Neither have the requirements of the supplemental orders entered by the district court in accordance with the reserved powers retained in the consent decree. Most importantly, no one denies that the Harris County detention facilities are currently grossly unconstitutional as a result of severe overcrowding. The only real issue at this point is whether, and to what extent, state officials have a duty to participate in eliminating these undeniably unconstitutional conditions.

While it is clear the county defendants have an obligation to eradicate unconstitutional conditions in the Harris County jails, it is less certain how much responsibility the state defendants bear, under state law, to participate in rectification of the problem by either removing state-ready inmates promptly from Harris County jails or paying the county for the cost of housing excess populations elsewhere.

Once a constitutional violation has been shown to exist, as it has in this case, the court must look to state law to determine which governmental officials are responsible for remedying the deficiency. *Bush v. Viterna*, 795 F.2d 1203, 1209 (5th Cir. 1986); In Re Clements, 881 F.2d 145, 154-155 (5th Cir. 1989). It is common ground in this case (and indeed, indisputable) that the county defendants have affirmative obligations under (a) the consent decree, (b) the constitution, and (c) state law, TEX. LOCAL GOV'T. CODE §§ 351.001 and 351.041; In re Clements, 881 F.2d at 154; *Bush v. Viterna*, 795 F.2d at 1206, to provide and pay for constitutional jails for all persons confined in their facilities until they are transferred to the custody of the state defendants. The unresolved question here is whether, and to what extent, state officials also bear responsibility for rectifying unconstitutional conditions in illegally overcrowded county jails housing state-ready prisoners by promptly removing from such facilities inmates who have been sentenced to serve time in the custody of the Texas Department

of Criminal Justice - Institutional Division and are ready for transfer to state custody (or paying for the housing of such inmates elsewhere).

The reason there is uncertainty about this issue is that the Texas courts have not yet finally ruled on the meaning or scope of the Comprehensive Criminal Justice Reform Act passed by the legislature in 1989, TEX. GEN. & SPECIAL LAWS 1989, Reg. Sess. ch. 785, pp. 3470-3558 (H.B.No.2335) in this context. Prior to September 1, 1989 (the effective date of H.B.2335), Texas law had traditionally recognized a rather bright line dichotomy concerning the responsibilities of county and state officials for the housing of felony offenders: before conviction, such prisoners were the responsibility of county officials (the sheriff and the commissioners court); upon being sentenced to serve penitentiary time, the inmates were to be "speedily" transferred to the Texas Department of Corrections, TEX. REV. CIV. STAT. ANN. art 6166r (Vernon 1970) and became the responsibility of the state. Thus, prior to enactment of H.B. 2335, state law effectively vested exclusive responsibility for the constitutional housing of convicted felons in state officials.

In 1989, the Texas legislature fundamentally revised the relationship between the state and the counties with regard to the housing of convicted felons. While the TDCJ-ID[46] still has "primary" responsibility for the housing of convicted felons, TEX. REV. CIV. STAT. ANN. art 44113(401) § 1.02(a)(1) (Vernon Supp. 1991), there appears to have been a significant change in the extent of the state's duty to house such inmates. In the first place, the requirement that convicted felons be transferred to the TDCJ-ID "speedily" has been deleted from state law. More importantly, an elaborate mechanism, grounded in a complex formula, has been established to "allocate" among all the counties of Texas the finite number of prisoner spaces available within the TDCJ-ID. TEX. REV. CIV. STAT. ANN.

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46 That is the new name for what used to be called the Texas Department of Corrrections (TDC).

art 6166a-4 (Vernon 1991). Each county is permitted to send to the TDCJ-ID a certain number of inmates each week, and that number is determined by a detailed formula devised by the legislature and implemented by the county defendants (the members of the Texas Board of Criminal Justice).

Recognizing that the number of admissions "allocated" to the counties would invariably be less than the numbers of persons historical sentenced to TDC, the legislature created a spectrum of intermediate sanctions[47] which the district courts could utilize in lieu of TDCJ-ID incarceration, and the state provided substantial funds to the counties to finance, at the local level, those alternatives to institutionalization in the penitentiary.[48]

Thus, on the face of it, Texas appears to have decided in 1989 to limit state responsibility for accepting sentenced inmates from the counties to the numbers derived from the allocation formula, to provide funds to the counties to pay for alternative intermediate sanctions, and to require the counties to bear the financial burden of housing any more prisoners in their facilities, including so-called state-ready inmates, themselves.

Not surprisingly, the counties balked at the state's apparent effort to shift a portion of the traditional burden of paying for the housing of state-ready inmates to the local governments. Two lawsuits were filed in state district court in Travis County asserting, in essence, that the state still has responsibility to remove state-ready prisoners promptly from the county jails, or to pay the counties the cost of incarcerating them in local facilities pending transfer to the TDCJ-ID, even

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[47] Boot camps, super-intensive probation, residential probation centers, and electronically monitored home detention are examples of the kinds of intermediate, non-penitentiary punishments specifically sanctioned by the legislature.

[48] The statewide budget for funding H.B. 2335 programs from September 1, 1990 through August 31, 1991, was $50 million. Harris County's share of that fund was approximately $10 million.

after enactment of H.E. 2335. *County of Nueces v. Texas Board of Corrections*, No. 452,071 (Dist. Ct. of Travis Co., 126th Judicial Dist. of Tex.); *Harris County v. State of Texas*, No. 475,468 (Dist. Ct. of Travis Co., 126th Judicial Dist. of Tex.). In both of those cases, state district court Judge Joseph Hart ruled in favor of the counties and concluded that the state officials continue to have a duty, under Texas law, even after passage of H.B. 2235, to take all convicted felons from the counties promptly or pay for the cost of housing state-ready inmates in local facilities.[49] In essence, the state defendants must either "take or pay" according to Judge Hart.

Ever since enactment of H.B. 2335, uncertainty concerning its meaning and the extent to which it relieved state officials of responsibility for state-ready prisoners, have prevented comprehensive resolution of the Alberti case. Everybody acknowledges that Harris County detention facilities are unconstitutional due to massive overcrowding. The state defendants claim, however, that the sole responsibility to cure those deficiencies rest wholly with county officials (as a result of enactment of H.B. 2335), while the county defendants unswervingly insist that since the current overcrowding is in large part the result of the state defendants' failure promptly to remove state-ready prisoners from the local jails, the state should effect the remedy, notwithstanding passage of H.B. 2335.[50]

This routine has gone on for more than a year and a half now. At every opportunity, the state defendants cite the passage

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[49] The Nueces County case is winding its way through the state appellate system. The state's opening brief was filed on March 29, 1991; the appellees' brief will be due on April 29, 1991, if no extension of time is requested or granted. In the Harris County case, Judge Hart granted summary judgment in favor of the county as to liability. Since the parties have been unable to agree to the per diem costs of incarcerating prisioners in Harris County, trial on that "damages" issue has been set for May 13, 1991.

[50] The county defendants argue that, other than providing a few extra dollars for some locally based programs, H.B. 2335 really did not effectuate a significant change in prior law concerning the state's traditional responsibility with regard to state-ready prisoners.

from *Bush v. Viterna*, 795 F.2d at 1209, to the effect that the state has "virtually complete freedom to decide who will be responsible" for discharging constitutional obligations, and claim that the legislature, in enacting H.B. 2335, did just that and opted to delegate to the counties exclusive responsibility for the housing of state-reeady inmates in constitutional facilities (at least until there is room in the ID to accept them into state custody), and assert that, therefore, they have been relieved, by state law, from any duty to participate in effectuating a remedy for the admittedly unconstitutional conditions in the Harris County jails. Invariably, the county defendants respond that the state officials misapprehend the real meaning and import of H.B. 2335 and that state officials are still primarily obligated, under Texas law, to remove state-ready inmates promptly from the Harris County jails, at least where leaving the prisoners in that terribly overcrowded facility subjects them to unconstitutional privations and violates rights secured by the eighth and fourteenth amendments to the constitution of the United States.

Meanwhile, plaintiffs languish in horrible conditions which no one suggests comport with constitutional standards and no one denies pose serious threats to the health, safety, welfare, and, indeed, lives of the inmates condemned to be warehoused there, as well as the public at large.

It is apparent that no real, final comprehensive remedy will be achieved in this case until the Texas courts sort out the uncertainties existing in Texas law and determine definitively, and decisively, the scope of the state officials' responsibility, under Texas law, to remove state-ready prisoners from unconstitutional county jails. Until that state law determination is made, this litigation is, effectively, on a tread mill and no permanent solution to this protracted case and the seemingly never-ending problems of overcrowding in the Harris County jails can realistically be effected.

Accordingly, plaintiffs propose that this court certify to the Texas Supreme Court, under TEX. R. APP. P. 144 and TEX. CONST. 145 V § 3-c, the following questions:

a. Does Texas law impose on state (as opposed to county) officials a duty promptly to remove from unconstitutionally overcrowded county jails prisoners who have been convicted of felony offenses and sentenced to serve time in the custody of the Texas Department of Criminal Justice-Institutional Division in excess of the numbers of inmates required to be accepted into the TDCJ-ID weekly pursuant to the allocation formula promulgated pursuant to TEX. REV. CIV. STAT. ANN. art 6166a-4 (Vernon 1991)?

b. Assuming that the answer to the foregoing question is yes, does Texas law require or authorize funds from the state treasury to be utilized to pay the cost of housing excess state-ready prisoners in available cells in county jails, where state officials have declined (or are unable) to receive such inmates into the TDCJ-ID as a result of that facility being populated to the maximum extent allowed by law?

Those questions are decidedly ones which should be addressed by the Texas Supreme Court in the first instance. There is obviously no clearly controlling Texas precedent (other than Judge Hart's rulings, which are on appeal or interlocutory), and the matters are truly issues of first impression in this state. The principles of comity and federalism counsel in favor of permitting the courts of the state of Texas the opportunity to answer these crucial issues of state law, instead of the federal

courts trying to divine what Texas courts might ultimately do with them so long as plaintiffs' constitutional rights are not continually violated in the meantime (i.e. federally ordered relief proceeds).

If the certification process has any role in preserving the federal-state balance, certainly this case presents the ideal occasion for the federal court to seek definitive guidance from the highest court of the state on these state law questions in these areas of such great importance to the public policy and interest of the state.[51]

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51 Of course, referral of these questions to the Texas Supreme Court must not delay relief to the plaintiff class in any respect. Rather, the court should command the district court to order the defendants to take whatever steps are necessary to achieve needed reductions in county jail populations, including housing excess populations in vacant cells in other counties, even while the certification process is going on. No principle of comity or federalism, or other consideration, would permit the intolerable conditions currently existing in the Harris County jails to continue and persist while the Texas Supreme Court sorts out the unsettled qustions of Texas law concerning which level of government (state or county) should pay for the remedy.

APPENDIX E

NO. 475,468

HARRIS COUNTY, TEXAS,	§	IN THE DISTRICT
	§	COURT
Plaintiff and Relator,	§	
	§	
V.	§	
	§	
THE STATE OF TEXAS; ANN RICHARDS, GOVERNOR OF THE STATE OF TEXAS; TEXAS DEPARTMENT OF CRIMINAL JUSTICE; JAMES LYNAUGH, DIRECTOR; TEXAS BOARD OF CRIMINAL JUSTICE; CHARLES T. TERRELL; JERRY H. HODGE; F. L. STEPHENS; BEN GALLANT, JR.; JAMES ELLER; MAMIE MOORE PROCTOR; ROBERT MANN; AND ALLAN B. POLUNSKY; AS MEMBERS OF THE TEXAS BOARD OF CRIMINAL JUSTICE,	§	TRAVIS COUNTY, TEXAS
	§	126TH JUDICIAL DISTRICT
Defendants and Respondents	§	

AGREED ORDER VACATING JUDGMENT

On the date indicated below came on to be heard the joint motion of the Plaintiff/Relator, the Harris County, Texas, and the Intervenor, Montgomery County, Texas; together with the Defendants/Respondents, the State of Texas; Ann Richards, Governor of the State of Texas; Texas Department of Criminal Justice; James Lynaugh, Director; Texas Board of Criminal Justice; Charles T. Terrell; Jerry H. Hodge; F. L. Stephens; Ben

Gallant, Jr.; James Eller; Maime Moore Proctor; Robert Mann; and Allen B. Polunsky; as members of The Texas Board of Criminal Justice for vacation of the judgment entered by this Court on August 2, 1991. The Court, having considered the said motion, finds that the parties have satisfactorily compromised and settled all matters in dispute in this cause. The Court further finds that the vacation of the judgment is conditional on the Defendants/Respondents' performance of the requirements of the Agreement, attached to the motion as Attachment A, and on the Plaintiff/Relator and Intervenor being able to file a motion with this Court to reinstate the judgment, attached to the motion as Exhibit C to Attachment A, if Defendants/Respondents fail to perform under the terms of the Agreement. The Court further finds that the vacation of judgment is conditional on the agreement of the parties that if the Court determines that the Defendants/Respondents have violated the terms of the Agreement, then the Court shall reinstate and enter the original judgment, attached to the motion as Exhibit C to Attachment A. Further, the vacation of the judgment is, and shall be, conditional on the agreement of the parties that if the Court determines that the Defendants/Respondents have violated the terms of the Agreement, and determines that it is unable to reinstate the judgment as provided, the Court shall enter the Judgment attached to the motion as Exhibit C to Attachment A. The Court further finds that the Defendants/Respondents reserve their right to appeal if the judgment is reinstated or the new Judgment is entered. The Court further finds that the motion should be granted.

It is therefore, ORDERED, ADJUDGED, and DECREED that the judgment entered by this Court on August 2, 1991, in the above-styled and numbered cause be, and the same hereby is, vacated subject to being reinstated if the Defendants/Respondents fail to perform the requirements of the Agreement attached to the motion as Attachment A, or, in the alternative, if the Court determines that the Defendants/ Respondents have violated the terms of the Agreement, and determines that it is unable to reinstate the judgment, the entry

of the new Judgment attached to the motion as Exhibit C to Attachment A.

SIGNED and ENTERED this 25th day of October, 1991.

/s/
JUDGE JOSEPH HART
126th Judicial District

APPROVED AS TO FORM AND SUBSTANCE:

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By: /s/
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ATTORNEYS FOR INTERVENOR
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MARY F. KELLER
Executive Assistant Attorney General

By: /s/
DAN MORALES
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ATTORNEYS FOR RESPONDENTS

APPENDIX F

NO. 452,071

THE COUNTY OF NUECES, TEXAS, ET AL. Relator	§	IN THE DISTRICT COURT
V.	§	
TEXAS BOARD OF CORRECTIONS; CHARLES T. TERRELL; JERRY H. HODGE; F. L. STEPHENS; DERALYN R. DAVIS; JAMES ELLER; DENNIS R. HENDRIX; JOE V. LAMANTIA; ROBERT MANN; ALLAN B. POLUNSKY; JAMES A. LYNAUGH,	§	TRAVIS COUNTY, TEXAS
Respondents	§	250TH JUDICIAL DISTRICT

AGREED ORDER VACATING JUDGMENT

On the date indicated below came on to be heard the joint motion of the Relator, the County of Nueces, Texas; and the Intervenors, The County of Travis, Texas, the County of Tarrant, Texas, The County of Dallas, Texas, The County of Victoria, Texas, The County of Collin, Texas, The County of Hunt, Texas, The County of Bexar, Texas, The County of El Paso, Texas, The County of Lubbock, Texas, The County of Galveston, Texas, and The County of Hidalgo, Texas; together with the Respondents, Texas Board of Corrections, Charles T. Terrell, Jerry H. Hodge, F. L. Stephens, Deralyn Davis, James Eller, Dennis R. Hendrix, Joe V. LaMantia, Jr., Robert Mann, Allan B. Polunsky, and James A. Lynaugh for vacation of the judgment entered by this Court on August 22, 1990. The Court, having considered said motion, finds that the parties have

satisfactorily compromised and settled all matters in dispute in this cause. The Court further finds that the vacation of the judgment is conditional on the Respondents' performance of the requirements of the Agreement, attached to the motion as Attachment A, and on the Relator or, any or all of, the Intervenors being able to file a motion with this Court to reinstate the judgment, attached to the motion as Exhibit D to Attachment A, if Respondents fail to perform under the terms of the Agreement. The Court further finds that the vacation of judgment is conditional on the agreement of the parties that if the Court determines that the Respondents have violated the terms of the Agreement, then the Court shall reinstate and enter the original judgment, attached to the motion as Exhibit D to Attachment A. Further, the vacation of the judgment is, and shall be, conditional on the agreement of the parties that if the Court determines that the Respondents have violated the terms of the Agreement, and determines that it is unable to reinstate the judgment as provided, the Court shall enter the Judgment attached to the motion as Exhibit E to Attachment A. The Court further finds that the Respondents reserve their right to appeal if the judgment is reinstated or the new Judgment is entered. The Court further finds that the motion should be granted.

It is therefore, ORDERED, ADJUDGED, and DECREED that the judgment entered by this Court on August 22, 1990, in the above-styled and numbered cause be, and the same hereby is, vacated subject to being reinstated if the Respondents fail to perform the requirements of the Agreement attached to the motion as Attachment A, or, in the alternative, if the Court determines that the Respondents have violated the terms of the Agreement, and determines that it is unable to reinstate the judgment, the entry of the new Judgment attached to the motion as Exhibit E to Attachment A.

SIGNED and ENTERED this 14th day of November, 1991.

/s/
JUDGE JOSEPH HART
250th Judicial District

APPROVED AS TO FORM AND SUBSTANCE:

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By: /s/
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By: /s/
Dan Morales
State Bar No. 14417450

ATTORNEYS FOR RESPONDENTS

APPENDIX G

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

GILBERT F. GANUCHEAU
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA. 70130

April 7, 1992

IMPORTANT NOTICE

TO ALL COUNSEL OF RECORD

No. 91-6062 - Lawrence R. Alberti, El Al. vs.
The Sheriff of Harris County, TX, Et Al.
(Consolidated with Nos. 91-6206 & 91-2946)

Projected Week of Hearing July 6, 1992

Dear Counsel:

This letter will serve as advance notice that the above referenced case will be assigned for oral argument sometime during the week shown above, on a yet undetermined date.

We are giving this much advance notice to avoid conflicts. If you should have a serious and otherwise irresolvable conflict, please contact the undersigned **IMMEDIATELY**. Please do not seek reassignment unless your problem is acute and cannot be handled in any other manner.

GERALYN A. MAHER
Calendar Clerk

(504) 589-6071
FTS 682-6071

/gam

Messrs. Robert Ozer and
John B. Worley
Ms. Lisa S. Rice and
Mr. Harold M. Streicher
Mr. James Oitzinger
Mr. Gerald M. Birnberg

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-6062
(D.C. #CA-H-72-1094)

LAWRENCE R. ALBERTI, ET AL.
Plaintiffs-Appellees,

versus

THE SHERIFF OF HARRIS COUNTY, TEXAS, ET AL.
Defendants-Third Party Plaintiffs-
Appellees-Cross Appellants,

versus

ANN RICHARDS, THE GOVERNOR OF TEXAS, ET AL.,
Third Party Defendants-Appellants-
Cross Appellees

* *

No. 91-6206

LAWRENCE R. ALBERTI,
Plaintiff,

versus

THE SHERIFF OF HARRIS COUNTY, TEXAS, ET AL.
Defendants-Third Party
Plaintiffs-Appellees,

versus

ANN RICHARDS, THE GOVERNOR OF TEXAS, ET AL.,
Defendants-Third Party Defendants-
Appellants.

* *

No. 91-2946

LAWRENCE R. ALBERTI, ET AL.

Plaintiff

versus

THE SHERIFF OF HARRIS COUNTY, ET AL.

Defendants-Third Party
Plaintiffs-Appellees,

versus

ANN RICHARDS, THE GOVERNOR OF THE STATE OF TEXAS, ET AL.,

Defendants-Third Party
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Texas

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O R D E R:

IT IS ORDERED that the motion of Governor Ann Richards, Et Al., to consolidate the referenced appeals is GRANTED.

IT IS FURTHER ORDERED that the motion of Governor Ann Richards, Et Al., to Expedite the referenced appeals is GRANTED.

/S/
PATRICK HIGGINBOTHAM
UNITED STATES CIRCUIT JUDGE

APPENDIX I

EXCERPTS FROM STATE APPELLANTS' BRIEF (pp. 85-87) IN ALBERTI, ET AL. V. THE SHERIFF OF HARRIS COUNTY, ET AL. V. ANN RICHARDS, THE GOVERNOR OF TEXAS, ET AL., FIFTH CIRCUIT NOS. 91-2274, 91-2210, 90-6034, 90-2441

A. The Alberti Court Erred in Finding that the Design Capacity of the Jail is the Constitutional Capacity,[73] and the Lower Courts Erred in Excluding Evidence on the Constitutional Capacity of the Harris County Jail.

The Alberti court's Finding of Fact 28 states that the design capacity of the jail (which has one prisoner per cell) is also its constitutional capacity. Joint Appendix, No. 27 at 26. The finding rests on the "poor physical design" of the jail and the lack of a "second means of egress." Id. There was no testimony to show that adding a second means of egress would be impossible. The "poor physical design" apparently refers to the inability of the guards to see into all cells at all times. But there was no testimony to show that the ability to see into all cells at all times was necessary for the prisoners' safety and well-being given proper classification and segregation. There was no testimony, in particular, to show that prisoners' safety would be compromised if properly classified non-violent offenders were double-celled and the jail adequately staffed and regularly patrolled.

State Defendants' criminal justice expert Steve Martin gave testimony to show that constitutional capacity and design capacity are not the same at the first trial. See trial of the week of August 15, 1989, tr. vol. 3 pp. 511-516. At the trial of August 14-15, 1990, after his third tour of the jail, Mr. Martin testified that the jail might be made constitutional, with the proper

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[73] State Defendants will not brief this point extensively, since they understand that the County Defendants intend to brief it as well.

classification and management practices, at a population of 5,800. See tr. vol. 1, pp. 128-144, esp. 143-144.

At the trial of February 27, 1990, however, the Alberti and Ruiz courts, sitting together, excluded testimony from Mr. Martin that would have shown that some double-celling could be used in the jail. They made this ruling on the grounds that double-celling was not part of State Defendants' remedial plan. See trial of February 27, 1990, tr. vol. 1(A), pp. 89-95; also, State Defendants' Offer of Proof filed March 2, 1990. But it would not have been appropriate for State Defendants to have included double-celling in their remedial plan, since that concerned the internal management of the jail. State Defendants remedial plan properly addressed what they could do to relieve the overcrowding. The courts should not have expected State Defendants to have included recommendations on the internal management of the jail in their plan.

In addition, the question of the constitutional capacity of a detention facility in an institutional reform case, which is imprecise, fluid and subject to changing circumstances, is one that a court should be willing to re-visit when new and relevant information is available. See Ruiz v. Estelle, 679 F.2d 1115, 1148 (5th Cir. 1982) ("wait and see" approach taken on constitutional necessity for single-celling). Indeed, as in Ruiz, a "wait and see" approach would be appropriate here. See also Rhodes v. Chapman, 452 U.S. 337, 348-50 (1981). The lower courts therefore erred in excluding this evidence and in adhering to design capacity as the constitutional capacity without waiting to see the effect of reductions in population.

APPENDIX J

EXCERPTS FROM COUNTY APPELANTS' BRIEF (pp. 49-56) IN ALBERTI, ET AL. V. THE SHERIFF OF HARRIS COUNTY, ET AL. V. ANN RICHARDS, THE GOVERNOR OF TEXAS, ET AL., FIFTH CIRCUIT NOS. 91-2274, 91-2210, 90-6034, 90-2441

ISSUE V

THE ALBERTI COURT ERRED AS A MATTER OF LAW IN DETERMINING THAT THE CONSTITUTIONAL CAPACITY OF THE HARRIS COUNTY JAIL FACILITIES IS THE SAME AS THE DESIGN CAPACITY OF THE HARRIS COUNTY JAIL FACILITIES, AND UPON DE NOVO REVIEW, SUCH APPLICATION CONSTITUTES REVERSIBLE ERROR. MOREOVER, THE ALBERTI COURT'S SUBSIDIARY AND ULTIMATE FINDINGS OF FACT RELATING TO ITS DETERMINATION OF THE CONSTITUTIONAL CAPACITY ARE SUPPORTED BY INSUFFICIENT EVIDENCE, ARE CONTRADICTED BY LATER REMEDIAL ORDERS IN THIS CASE, AND MUST BE REVERSED. ALTERNATIVELY, THE ALBERTI COURT'S SUBSIDIARY AND ULTIMATE FINDINGS OF FACT RELATING TO ITS DETERMINATION OF THE CONSTITUTIONAL CAPACITY IN THE HARRIS COUNTY JAIL FACILITIES ARE CONCLUSORY AND INADEQUATE TO GIVE THE PARTIES AND THIS COURT A CLEAR UNDERSTANDING OF THE PROCESS BY WHICH THE ALBERTI COURT'S ULTIMATE CONCLUSIONS WERE REACHED, AND MUST BE REVERSED.

County Defendants contest the Alberti court's subsidiary and ultimate findings of fact, mixed findings of fact and conclusions of law, and application of law to the determination of the constitutional capacity of the Harris County Jail facilities.

County Defendants further dispute the Alberti Court's denial of their October 11, 1989 motion to amend the Alberti Court's September 25, 1989 Findings of Fact and Conclusions of Law as to this issue.[158]

The Alberti Court's September 25, 1989 Findings of Fact establish a per se, Constitutional threshold not supported in law, or by the record and the Alberti/Ruiz Court's later remedial orders. These findings provide, in pertinent part, that:

> 28. Because of the poor physical design of the central jail and the lack of a second means of egress from the Detention Center, the Court finds that the maximum constitutional capacity for the Harris County Jail is its overall design capacity, or a total of 4,281 inmates. This Court's previous staffing order entered December 18, 1984 assumed that a 9-9-7 staffing ration [sic] could adequately safeguard no more than the number of inmates the facilities were designed to house.[159]

The Alberti Court's Conclusions of Law, however, do not specifically address its equation of design and Constitutional capacities.

The "Constitutional" capacity of a jail must be determined by looking at the totality of the conditions in the jail, not simply by referral to design capacity. In determining whether conditions in the Jail facilities constitute cruel and unusual punishment prohibited by the Eighth Amendment, the Court "need not separately weight each of the challenged

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158 App. 54-#1090; App. 25.

159 App. 27-26.

practices and conditions, [but] instead must look to the totality of the conditions.'"[160]

The Alberti Court erred in equating design capacity with the Constitutional capacity in the Harris County Jail facilities. In Miller v. Carson, for example, the United States District Court for the Middle District of Florida ordered that the officials house no more than the design capacity of Jacksonville, Florida jail.[161] This Court, in a November, 1977 appeal, observed that "'designed capacity'" is a 'tool', not the sine qua non, for determining constitutional capacity.[162]

That same year, in Williams v. Edwards, the United States District Court for the Middle District of Louisiana enjoined the Governor of Louisiana, the Warden of Louisiana State Prison, the Director of the Louisiana Department of Corrections and others from accepting any new prisoners other than escapees and parole revokees into Angola until such time as the Angola inmate population "is no greater than design capacity."[163] In 1977, this Court affirmed the "temporary, emergency" order prohibiting new additions to the inmate population at Angola. According to this Court:

> The functions and characteristics of each building should be taken into account in arriving at the capacity of each. A simple mathematical calculation of total square feet of space divided

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160 Alberti v. Klevenhagen, 790 F.2d 1220, 1224 (5th Cir. 1986), quoting Ruiz v. Estelle, 679 F.2df 1115, 1139 (5th Cir.), modified on other grounds, 688 F.2d 266 (5th Cir. 1982), cert. denied, 460 U.S. 1042, 103 S.Ct. 1438, 75 L.Ed.2d 795 (1985); Jones v. Diamond, 636 F.2d 1364, 1368 (5th Cir.), cert dism'd sub nom, Ledbetter v. Jones, 453 U.S. 950, 102 S.Ct. 27, 69 L.Ed.2d 1033 (1981) (Fourteenth Amendment); Newman v. Alabama, 559 F.2d 283, 291 (5th Cir. 1977), cert. denied, 438 U.S. 915, 98 S.Ct. 3144, 57 L.Ed.2d 1160 (1978) (Eighth Amendment).

161 Miller v. Carson, 563 F.2d 741 (1977).

162 Miller, 563 F.2d at 752, n. 18.

163 Williams, 547 F.2d at 1208.

> by a standard of square feet per man may not necessarily be appropriate or practicable.[164]

That same year, this Court determined Newman v. Alabama, rejecting the application of design capacity as the only factor in calculating per se constitutional limitations on capacity in Alabama prisons:

> Unless intended to apply only to existing facilities we do not discern the constitutional basis for the requirement that Alabama State prisoners shall be housed in individual cells, nor can we agree that "design" standards, without more, amount to a per se constitutional limitation on the number of prisoners which may be housed in a particular prison facility. Those who design prisons are not vested with either the duty or the power to prescribe constitutional standards to prison space.

Although this Court allowed the district court to limit capacity in existing prisons to design capacity, it remanded for recalculation capacity limitations in future construction in accordance with its decision in Williams v. Edwards.[165]

In United States ex. rel. Wolfish v. United States ("Wolfish"), the United States District Court for the Southern District of New York made capacity determinations relating to the dormitory unit at the New York City Correctional Center, which, although designed to house 60 inmates, actually held

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164 Williams, 547 F.2d at 1215.

165 Newman v. Alabama, 559 F.2d 283, 288 (5th Cir. 1977), judgment rev'd in part sub nom on other grounds, Alabama v. Pugh, 438 U.S. 781, 98 S.Ct. 3057, 57 L.Edf.2d 1114 (1978), citing, Williams, 547 F.2d at 1215.

120 inmates, or 200 percent of its "rated" capacity.[166] After considering two factors, including design capacity and the "fundamental denia[l] of decency, privacy, personal security, and, simply, civilized humanity . . ." associated with double celling, the district court capped the permissible prisoner population at rated capacity.[167]

Although it approved the district court's privacy considerations, the Second Circuit found that the trial court's refusal to consider whether "any number of inmates in excess of rated capacity could be suitably quartered within the dormitories" was unwarranted. That appellate court remanded the case to the trial court for reconsideration of the lower court's determination of constitutional capacity, emphasizing:

> There is no constitutional magic to the term "rated capacity." Indeed, "[t]hose who design prisons are not vested with either the duty or the power to prescribe constitutional standards as to prison space.[168]

The Supreme Court, on review, disagreed with the district court's and Second Circuit's privacy analysis and concluded that the Second Circuit had applied the wrong standard of review.[169] According to the Court, there is no "one man, one cell" principle lurking in the Due Process Clause of the Fifth Amendment.[170]

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166 United States ex rel. Wolfish v. United States, 428 F. Supp. 333, 136 (S.D.N.Y. 1977), aff'd in part, rev'd in part, Wolfish v. Levi, 573 F.2d 118 (2d Cir. 1978), judgment rev'd, Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).

167 Wolfish, 428 F. Supp. at 339.

168 Wolfish v. Levi, 573 F.2d 118, 128 (2d Cir. 1978), judgment rev'd on other grounds, Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) (finding that Second Circuit used wrong standard of review), quoting, Neman, 559 F.2d at 288.

169 Bell v. Wolfish, 441 U.S. 520, 531-32, 535, 539, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).

170 Bell v. Wolfish, 441 U.S. 520, 541-42, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).

In Rhodes v. Chapman, the United States District Court for the Southern District of Texas found that double bunking two prisoners in one cell at the Southern Oil Correctional Facility constituted cruel and unusual punishment. In making this constitutional capacity-ready determination, the district court reasoned that: (1) the prisoners were serving long terms of punishment, which "could only accent[uate] the problems of close confinement and overcrowding; (2) that SOCF housed 38% more inmates at the time of trial than its "design capacity"; (3) that contemporary standards of decency reflected in several studies recommended that each prison in an institution have at least 50-55 square feet of living quarters (double celled prisoners shared 63 square feet); (4) that a double-celled prisoner at SOCF would spend most of his time in the cell with his cellmate; and (5) that SOCF has made double celling a practice, rather than a temporary condition.[171]

On appeal, the Sixth Circuit affirmed the district court's order, holding that its findings were not clearly erroneous, that its legal conclusions were permissible from the findings and that its remedy reasonably responded to the violations.[172] The Supreme Court, however, reversed,[173] finding that the five conditions articulated by the district court fell short in themselves of proving cruel and unusual punishment:

> The five considerations on which the District Court relied are insufficient to support its constitutional conclusion . . . These general considerations fall far short in themselves of proving cruel and unusual punishment, for there is no evidence that double celling under these circumstances either inflicts unnecessary or

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171 Rhodes v. Chapman, 452 U.S. 337, 101 S.Ct. 2392, 2397-98 L.Ed.2d 59 (1981).

172 Rhodes, 101 S.Ct. at 2398, citing Chapman v. Rhodes, 624 F.2d 1099 (6th Cir. 1980).

173 Rhodes, 101 S.Ct. at 2398.

> wanton pain or is grossly disproportionate to the severity of crimes warranting imprisonment.[174]

The Court a deemphasized the fact that SOCF was at 138% of "design" capacity at time of trial, observing that "[t]he question before us is not whether the designer of SOCF guessed incorrectly about future prison population, but whether the actual conditions of confinement at SOCF are cruel and unusual.[175] Here, as in the above-referenced cases, a per se Constitutional capacity tied to design capacity fails.

Both the Alberti/Ruiz Court's September 7, 1990 joint remedial order and the Alberti Court's February 7, 1991 remedial order contradict this determination of Constitutional capacity. The remedial orders cap the jail population at 6100 and 6300, respectively. As the Alberti Court observed in its February 7, 1991 remedial order, "[i]n hearings in August, 1990, both the Alberti Special Master and the State defendants' expert testified that Harris County detention facilities can be managed safely and securely for a limited period at a population level somewhere between 5,500 and 6,000."[176] Given the Court's own willingness to forego this "design" capacity tied cap, this cap should be reversed.

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174 Rhodes, 101 S.Ct. at 2400.

175 Rhodes, 101 S.Ct. at 2401.

176 App. 5-5 & App. 15-3. See Aug. 14, 1990 TR. at 144 11. 2-5 ("... I am confident in predicting that the 5800 number doesn't, per se, constitute an unconstitutional overcrowding in the Harris County Jails.") (testimony of Steve Martin). See also Aug. 14, 1990 TR. VOL. I at 28, 11. 19-25, at 129, 11. 1-3 (doesn't believe 5,865 population in Harris County Jail facilities is inherently unconstitutional) (testimony of Steve Martin); (Aug. 15, 1990 TR. VOL. II at 14, 11. 8-25, at 15, 11. 5-15 (believes that prisoner population constitutional somewhere between 5,500 and 6,000) (testimony of Michael Keating, Alberti Court's Special Master).